The Central Law Journal.

ST. LOUIS, MAY 16, 1890.

It is a matter of considerable surprise to us that a recent important decision by the Supreme Court of Indiana has met with so little notice or comment, adverse or otherwise. We refer to the case of Hancock v. Yaden, 30 Cent. L. J. 192, where it was held that a statute prohibiting employees from making contracts in advance to accept anything else than lawful money of the United States is not unconstitutional, and that no special privileges are conferred, nor any unjust discrimination made by a statute requiring all persons, firms, corporations, etc., engaged in mining or manufacturing to pay their employees at least once every two weeks, and prohibiting all contracts by such employees to accept anything but lawful money of the United States in payment.

We have seen reference to it in but one of the legal journals, and there the decision was severely criticised. A case of such novelty, and one involving important rights, both of capital and labor, should have received more attention, and we regret that the question involved has not met with fuller discussion. There is undoubtedly ground for legitimate argument on both sides of the question. The analogy cited by the court between such an enactment, in abrogation of the right to contract, and the statute of frauds which enables contracting parties to avoid contracts not in writing may be in part tenable, but it might, with effect, be replied that the statute of frauds, in the particular limitation mentioned, is simply a rule of evidence, and not a limitation of an abstract right. This is clear, when we recall that part peformance of a contract, void under the statute, renders it enforcible in equity. And in the case of non-enforcibility of contracts waiving homestead or exemption rights, or stays of execution, or the right to resort to courts for redress, relied upon by the Indiana court, may it not be contended that these are rights which the law in set terms establishes, and which, upon grounds of public policy, cannot be effectively waived; and what is more, are not the limitations, placed in those instances, in the direction of securing legal rights, and not in fact abridgements of rights. Whereas in the case of contract of service it is undeniably true that the servant has an absolute right to accept such compensation as he chooses.

Though the question is one of considerable perplexity, it does seem to us that an act which forbids a private person to make a contract with employees to pay them at such times and in such manner as he thinks fit, and which puts it out of the power of the employee to work for anything but cash, is not only beyond the power of any legislature as being in derogation of the constitution that no State "shall deprive any person of life, liberty or property without due process of law," but is a precedent in the wrong direction. For ourselves, we cannot avoid indulging every presumption against the validity of acts which are in derogation of the right of citizens generally to manage their own affairs as they please, so long as they do not violate any substantive rule of law. With this feeling, we disapproved of the attempt on the part of the New York legislature, as made effectual by People v. Budd, to regulate the charges of grain elevators. And for the same reason we gave hearty assent to the recent decision by the Supreme Court of the United States, to the effect that the State of Minnesota had no right to fix railroad charges. And to be consistent, we are obliged to dissent from this interference on the part of the Indiana legislature with private rights.

It is remarkable that no authorities directly in point with the Indiana case seem to have been discovered by the court. The one nearest in point, to which our attention has been called, is in line with the position taken by us. That case is West Virginia v. Fire Creek Co., 6 Lawy. Rep. 359, where it was held that a statute which prohibits persons and corporations engaged in mining and manufacturing, and interested in selling merchandise and supplies to the employees at a greater per cent. of profit than they sell to others not employed by them, is unconstitutional and void, because it is class legislation, and an unjust interference with private contracts and business. The court there said that the act was "an unjust interference with the rights, priv-

ileges and property of both the employer and the employee, and places upon both the badge of slavery, by denying to the one the right of managing his own private business, and assuming that the other has so little capacity and manhood as to be unable to protect himself or manage his own private affairs."

NOTES OF RECENT DECISIONS.

PUBLIC SCHOOLS — BIBLE READING— SECTARIAN INSTRUCTION.—The case of State v. District Board, 44 N. W. Rep. 967, decided by the Supreme Court of Wisconsin, will have more than local interest, being on the subject, agitated at considerable length a few years ago, following the decision of an Ohio case, of the right to exclude the Bible from the public schools. The substantial question in the present case was simply as to the right to prevent the reading of the Bible in the schools, and whether such reading was in effect religious instruction. The opinions by Lyon, and Cassaday, JJ., are too long to give in full and our readers will have to be satisfied with a succinct statement of the main points:

1. The courts willl take judicial notice of the contents of the Bible, that the religious world is divided into numerous sects, and the general doctrines maintained by each sect; for these things pertain to general history, and may fairly be presumed to be subjects of common knowledge.

2. The "sectarian instruction" prohibited in the common schools by Const. Wis. art. 10, § 3, is instruction in the doctrines held by one or other of the various religious sects, and not by the rest; and hence the reading of the Bible in such schools comes within this prohibition, since each sect, with few exceptions, bases its peculiar doctrines upon some portion of the Bible, the reading of which tends to inculcate those doctrines.

3. The practice of reading the Bible in such schools can receive no sanction from the fact that pupils are not compelled to remain in the school while it is being read; for the withdrawal of a portion of them at such time would tend to destroy the equality and uniformity of treatment of the pupils sought to be established and protected by the constitution.

4. The reading of the Bible is an act of worship, as that term is used in the constitution; and hence the tax-payers of any district who are compelled to contribute to the erection and support of common schools have the right to object to the reading of the Bible therein, under Const. Wis. art. 1, § 18, cl. 2 declaring that "no man shall be compelled to * * * erect or support any place of worship."

5. As the reading of the Bible at stated times in a common school is religious instruction, the money drawn from the State treasury for the support of such school is "for the benefit of a religious seminary," within the meaning of Const. Wis. art. 1, § 18, cl. 4, prohibiting such an appropriation of the funds of the State.

The court calls attention to the fact that a number of cases in different States supposed to have a bearing upon the question here considered are not really in point because in none of the States in which such decisions were made is there a direct constitutional prohibition of sectarian instruction. We confess ourselves at a loss to understand how if, as the court holds, the reading from the Bible itself is sectarian instruction, text books containing extracts and passages therefrom may be read without objection as said by Judge Lyon, and this, even though the text books may contain passages "from which some inferences of sectarian doctrine might possibly be drawn." If it is sectarian instruction to read passages from the Bible is it not equally so when the reader reads the same thing from another book?

WILL MADE ON SUNDAY—VALIDITY OF. — The Supreme Court of Indiana in Rapp v. Reehling 23 N. E. Rep. 777, hold very properly that a will may be made on Sunday. Olds, J., says:

It is contended by counsel for appellant that a will executed upon Sunday is void unless it be shown that some unusual circumstances existed making a necessity for its execution upon that day; that the drafting and execution of a will come within the definition of a "common labor," and is prohibited by section 2000, Revised Statutes of 1881, which provides that "whoever, being over fourteen years of age, is found, on the first day of the week, commonly called Sunday, rioting, hunting, fishing, quarrelling, at common labor, or engaged in his usual avocation (works of charity and neccessity only accepted), shall be fined in any sum not more than ten dollars nor less than one dollar; but nothing herein contained shall be construed to affect such as conscientiously observe the seventh day of the week as the Sabbath, travellers, families removing, keepers of toll-bridges and toll-gates and ferrymen, acting as such." It is contended that a broad construction should be given to the words "common labor" and "usual avocation," so as to include the drafting and execution of a will, and that such has been the construction placed upon the statute by this court, by holding that contracts and bonds, and even church subscriptions, come within the term "common labor," and their execution is prohibited on Sunday, and are therefore invalid unless afterward ratified. We are unable to agree with the theory of counsel. There is a wide distinction between the execution of contracts, notes and bonds on Sunday and the execution of a will. The former are instruments executed in the common, every-day affairs of life in the usual course of business. They create a liability from one person to another. They are the foundation of, or a necessity for their execution arises out of, business transactions. It is not so in regard to a will. Its execution is the voluntary act of the testator. It may be revoked or changed, in a proper manner, at his discretion.

It provides for the disposition of the testator's estate after his death. It might be said to have some elements of sacredness about it. It is executed in anticipation of the death of the testator, and is to take effect at his death, and be operative thereafter. One of its prime objects is to enable the testator to provide in a proper manner for those who are the objects of his bounty, giving to those who need, and who ought to receive, his bounty, but who would not, were it not for the right of testamentary dispositon of property. By the execution of a will the testator is also enabled to aid in continuing and building up institutions of charity and learning, which would not be done by other methods, requiring a surrender of the full control of one's property during life; and these objects, accomplished by means of testamentary disposition of property, are entitled to be treated with some degree of sacredness and respect. But if the drafting and execution of a will could be said to fall within the term "common labor," yet there would at all times exist a necessity for the immediate execution of a will. The law recognizes the right of persons to make a testamentary disposition of their property by will, and to make such disposition while in life, and possessed of sufficient mental capacity to make a will; and the only certainty of being able to make such disposition of one's property is to do so instantly, when one is possessed of his faculties. Death is certain, and life is uncertain. One has no lease of life or his mental faculties. Either may be extinguished instantly, and the only security one has of being able to execute a will and dispose of his property in that manner as he may desire, is to do so when in the possession of his faculties; and the uncertainty of life creates a constant necessity, and presents to one's mind the uncertainty of being able to provide for those who are near to him, and are the objects of his bounty, or making provision for and aiding in the perpetuation of those institutions in which he is interested, and which are sacred to him and beneficial to the public interests, if the making of the will be delayed. The drafting and execution of a will is akin to the execution of a marriage contract, and solemnizing the marriage. * * * But we are not required to pass upon the question without authority, as the courts of other States have passed upon the same question, and held that a will executed on Sunday is valid. Bennett v. Brooks, 9 Allen, 118; Beitenman's Appeal, 55 Penn. St. 183; George v. George, 47 N. H. 27.

MUTUAL BENEFIT SOCIETY—SICK BENEFITS—LUNATIC.—The case of McCullough v. Expressman's Mut. Ben. Ass'n 19 Atl. Rep. 355, decided by the Supreme Court of Pennsylvania, will prove instructive to the managers of mutual benefit organizations. It is there held that a mutual benefit association which agrees to pay benefits to "every member who through sickness or other disability is unable to follow his usual business," must pay benefits to a member who becomes a lunatic. Mitchell, J., says:

That insanity is a sickness in some senses of the word is beyond question, and such legal authorities as appear to have considered the question hold that it ickness, within the meaning of such charters and articles of association as the defendant's. Thus in Burton v. Eyden, L. R. 8 Q. B. 295, an action against a "friendly society," the English designation of associations like the present appellee, the words of the by-law were: "During any sickness or accident that may befall him." Blackburn, J., said: "I am of opinion that lunacy is sickness, within the meaning of the rules of this society. * * * Insanity depends on the state of mind and body of the person. * * * It certainly seems to me that lunacy is a sickness affecting the health of the body in such a way as to prevent a man's ability of earning his livelihood. If it were not the intention to include it, the rules of the society should be framed so as expressly to exclude it." And Quain, J., said further: "I am also of opinion that insanity is sickness, within the society's rules. * * * The words * * * entitling the member to relief are, 'during any sickness or accident,' except certain excluded cases, insanity not being one." In Kelly v. Ancient Order, 8 Daly, 292, Van Brunt, J., says: "Insanity has always been considered a disease, and comes strictly within the meaning of the term 'sickness.'" And in Pellazzino v. Society, 16 Wkly. Cin. Law Bul. 27, it is assumed by Harmon. J., apparently without question by either party, that insanity entitles a member of such society to sick benefits.

MARRIAGE—PROOF OF COHABITATION.— A case illustrating this subject is White v. White, 23 Pac. Rep. 276, decided by the Supreme Court of California. The court there considered the evidence and held it sufficient to establish a marriage by consent of the parties. As to the validity of such marriage Thornton, J., after quoting Lord Cranworth in Campbell v. Campbell L. R. 1 H. L. Sc. 200, and Lord Westbury in the same case, to the effect that cohabitation with habit and repute is a mode of proving the fact of marriage, rather than a mode of contracting marriage, says:

To the same effect is the opinion of Lord Moncreiff in Lapsley v. Grierson, 8 Ct. Sess. Cas. (2d Series), 61, and in Lowrite v. Mercer, 2 Ct. Sess. (2d Series), 966. The same rule is recognized by the law of England. See Goodman v. Goodman, 28 Law. J. Ch. 745; Plunkett v. Sharpe, 1 Lee, Ecc. 441; Bond v. Bond, 2 Lee, Ecc. 45; Diddear v. Faucit, 3 Phillim. Ecc. 580; Hervey v. Hervey, 2 W. Bl. 877. See Starkie, Ev. (4th Ed.) 45, where the doctrine is explained. The observations of Starkie are quoted in 1 Fras. Husb. & Wife, 397. See, also, remarks of Lord Cranworth in L. R. 1 H. L. Sc. 199, 200. Fraser states that the rule is acknowledged to a limited extent in Code Civil of France, in relation to the legitimacy of children. Fras. Husb. & Wife, 397, 398.

The proof of marriage by cohabitation and repute has been recognized in many cases in the United States; as in Fenton v. Reed, 4 Johns. 52; Clayton v. Wardell, 4 N. Y. 230; Jones v. Hunter, 2 La. Ann. 254; Barnum v. Barnum, 42 Md. 251; Cargile v. Wood, 63 Mo. 501; Foster v. Hawley, 8 Hun, 68; Bicking's Appeal, 2 Brewst. 202; Purcell v. Purcell, 4 Hen. & M. 512; Brinkley v. Brinkley, 50 N. Y. 197, 198; Hynes v. McDermott, 10 Daly, 428, 82 N. Y. 46, 91 N. Y. 451; Badger v. Badger. 88 N. Y. 554; Van Tuyl v. Van Tuyl

57 Barb. 237; Rose v. Clark, 8 Paige, 580-582. That a marriage in this State may be established *per verba in præsenti*, or by a contract *per verba de futuro, cum subsequente copula;* was recognized in Estate of McCausland, 52 Cal. 577. The contract characterized as entered into *per verba de futuro* is only evidence of marriage as proving the requisite matrimonial consent. Such consent is essential to every marriage (1 Fras. Husb. and Wife, 415); and, prior to the adoption of the Civil Code in this State, consent alone constituted marriage.

TEACHER AND PUPIL—PUNISHMENT OF PUPIL.—An interesting case on the subject of the right of the teacher to punish the pupil is Boyd v. State, 7 South. Rep. 268, decided by the Supreme Court of Alabama. In that case the principal question decided was that the teacher, in view of the facts, was guilty of assault and battery in administering excessive and cruel punishment, but the statement of the law by Somerville, J., governing the rights and responsibilities of teachers was tersely and clearly stated. The better doctrine of the adjudged cases is that the teacher is, within reasonable bounds, the substitute for the parent, exercising his delegated authority. He is vested with power to administer moderate correction, with a proper instrument, in cases of misconduct which ought to have some reference to the offense, the sex, age, size and physical strength of the pupil. As to the extent of the punishment it may be laid down as a general rule that teacher's exceed the limits of their authority when they cause lasting mischief, but act within the limits of it when they inflict temporary pain. State v. Pendergass, 2 Dev. & B. 395; Lander v. Seaver, 76 Amer. Dec. 156; State v. Alford, 68 N. C. 322. And see article on the general subject in 28 Cent. L. J.

CRIMINAL LAW—PRIZE FIGHTING— VIDELICET.—The case of Sullivan v. State, 7 South. Rep. 275, decided by the Supreme Court of Mississippi, illustrates that a *videlicet* in criminal pleading may be a veritable boomerang, and proves the wisdom of the advice given by Mr. Bishop "to have nothing to do with the *videlicet* unless in exceptional circumstances." It was held there that an indictment for prize fighting must charge that the persons fought together, and against each other, in order to constitute the offense of "engaging" in the fight, and an indictment which charges that S did unlawfully engage in a prize-fight with K, "to-wit, did then and there, enter a ring, commonly called a 'prize ring,' and did then and there, in said ring beat, strike, and bruise said" K, is defective, as the *videlicet* excludes the conclusion that K fought. The opinion by Cooper, J., contains an exhaustive discussion of the object and effect of a *videlicet*.

THE MODERN LAW OF CURTESY.

On the death of the wife, the husband takes a freehold estate, for the term of his natural life, in all the lands and tenements of which the wife was seized in possession, in fee-simple or in tail, at or during coverture, provided always that there has been lawful issue born alive, which would have been entitled to inherit such estate. This interest is called a tenancy by the curtesy, or an estate by the curtesy, the terms being used interchangeably in the common law. The great body of the common law has been changed or modified by legislative enactment, and that particular branch now under review made partially to conform to the demands of justice. As regulated by statute, the law of curtesy, given us under the colonial government, is still in force in most of the States. There are, however, some exceptions to this rule. Under the civil law, curtesy could not exist. As Texas, California and Louisiana fell under the ban of the civil law, tenancy by the curtesy has never been recognized in those States. In still other instances the provisions of the common law have been disregarded and the husband has been given a certain fixed interest in his deceased wife's estate, by way of inheritance.[1] This rule prevails in Iowa and Indiana, where the estate proper is abolished by statute. But to Georgia and North Carolina must be given the credit of making the first great improvement in the common-law provisions. While in these States curtesy is defeated, the husband's interest in the realty of the deceased wife is an absolute fee.[2] Oregon and Iowa have made the nearest approach to justice and common sense by vesting the estate in

[1] Shouler H. & W. 473.
[2] 52 Ga. 315; 1 Wash. 129.

the husband, independent of the birth of issue.[3]

Essentials of the Estate.—To constitute an estate by the curtesy four things are necessary; first, the marriage; second, seizin in the wife; third, issue born alive capable of inheriting; fourth, death of the wife. Upon issue had, the right of the husband is said to be initiate; at the wife's death consummate. It would, however, be more properly claimed that the interest of the husband attaches at the time of marriage, subject to death or consummation by the happening or not happening of subsequent events. For instance, a woman, just before marriage, conveyed her real estate to a third party. The conveyance was very properly adjudged a fraud upon the husband and promptly set aside. Here is established, by inference, at least, that the right of curtesy is really initiate at marriage and before the birth of issue. To admit any other disposition would be to proclaim a rule that wedlock was an unnecessary preliminary to the enjoyment of the estate. The birth of issue is the second step towards consummation. Issue, born alive, out of wedlock, would defeat, not advance the husband's interest. Marriage is emphatically the first essential, and there is no just reason why it should be regarded otherwise. With marriage and issue born alive, curtesy is possible; without marriage the estate cannot exist.

1. *Marriage.*—It is enough here to give the well defined rules, which determine as to form and place, the validity of the contract by which curtesy is made to exist. The *lex loci contractus* governs the validity of the marriage. If valid where the contract is made, it is valid everywhere; invalid where made, invalid everywhere. In America, marriage is usually regarded as a civil contract and differs from other contracts only that it cannot be rescinded at the will of the parties. Hence, any agreement based upon the mutual consent of the parties, by which a man and woman agree to cohabit as man and wife necessarily establishes a legal marriage. Solemnization by clergymen is considered unnecessary in all but a few States and consent *per verba de presenti* is sufficient to constitute a valid contract.[5]

[3] 5 Sawyer, 125; 1 Wash. 249.
[4] Robertson v. Stevens, 1 Ired. Eq. 247.
[5] 23 N. Y. 90; 6 Halst. 12; 6 Binn. 405; 1 Bush, 62, 12 Vt. 396; 12 Ohio, 553; Yerg. 177; 6 Ala. 765; Law Journal, 384; 1 Abb. N. S. 195; 31 Mich. 126; 58 Mo. 510; 53 Miss. 371; 23 Minn. 528; 70 Ill. 484; 12 R. I. 485; 30 Ga. 173; 6 La. 463; N. H. 19 N. H. 257 (doubtful), North Carolina, Maine and Maryland require the statutory form to be observed.

2. *Seizin of the Wife.*—The wife must be possessed of the realty, which becomes the subject-matter of the estate. The seizin may be of two kinds, *pedis possessio* or actual possession, and constructive or legal possession. At common law actual seizin was necessary to constitute the estates both of curtesy and dower. But the husband's seizin in law was sufficient to establish the wife's dower, while curtesy could not attach, without possession by the wife both in deed and in fact. Actual possession was constituted by the wife holding the right to the fee and title, and either the wife, husband or a tenant of an estate less than freehold, occupying the estate, under the right of the wife or by the same title. But if the life estate of another was an incumbrance upon the wife's estate, and the wife held, in fee, simply the remainder or reversion, the *pedis possessio* necessary to entitle the husband to an estate by curtesy did not exist. In such a case, even the right and title of the wife may have been indisputable.[7] In America the right to possession has at all times been considered equivalent to possession in fact.[8] The question of possession was finally settled by the United States Supreme Court in the case of Davis v. Mason.[9] Livery of seizin first gave birth to the common-law rule, afterwards livery became unnecessary and constructive seizin of the wife speedily followed. The court held: "If a right of entry, therefore exists, it ought, by analogy, to be sufficient to sustain the tenure acquired by the husband; as it is laid down in the books relative to a seizin in law, he has the thing, if he has the right to have it." The opinion concludes by resting upon Lord Coke's celebrated maxim, "*Cessare ratione legis, cessat ipsa lex.*"

The same question was early passed upon in New York.[10] The *feme covert* was the owner of uncultivated lands in fee. After

[6] 2 Dev. & Batt. 177; 19 Me. 155; 35 Md. 361.
[7] Co. Litt. 29*a*; 8 Paige, 645.
[8] 8 Johns. 262; 3 Hill, 182; 43 N. Y. 543; 56 Barb. 168; 1 Peters (U. S.), 503.
[9] 1 Peters, 503.
[10] 8 Johns. 262.

the wife's decease, the husband sought to enforce his right to curtesy and was met with the objection that, as his wife had not acquired actual possession, no such interest could legally attach. In establishing the rule the court reasoned thus: "The wife is considered in law as in fact possessed so as to enable her husband to be a tenant by the curtesy." Actual entry or *pedis possessio* by the wife or husband during coverture, is not required to the completion of tenancy by the curtesy. What amounts to a constructive season sufficient for an estate by curtesy to attach has been a subject of much dispute and the limits of seizin are not fully established. Some of the requirements, however, have been settled by judicial decision.

A person, in his wife's right, became copartner with others in the ownership of a cotton factory. He received a proportionate share of the profits until after the wife's death. The seizin of the wife was sufficient to sustain estate by curtesy.[11] Title by descent or devise, and death before entry passed the estate, not to one's own heirs, but to the heirs of the person last actually seized. The statute of Henry VIII. ch. 10, § 2, changed the rule in regard to estates by purchase. Lord Coke says: "If a man dies seized of lands in fee-simple or fee tail general, and they descend to his daughter, who marries, has issue and dies before entry, yet in this case she had a seizin in law, but if she or her husband had entered during her life he would have been tenant by curtesy." The recovery, in ejectment, by the husband, of lands belonging to the wife is constructive seizin sufficient to vest a life estate in the husband in the lands recovered.[13] If an equitable estate exists to the wife, although the rents are to be paid to her separate use during coverture, the seizin is sufficient, the receipt of the rents being conclusive evidence.[14] The husband of a mortgagee in possession is not entitled to curtesy, though the estate become absolute at law, unless there has been a foreclosure or the mortgage has subsisted long enough to create a bar to redemption.[15] Where money has been agreed to be laid out in the purchase of land, a court of equity will treat the money as land and the husband will have an interest therein.[16] If partnership funds are used to purchase real property, for partnership purposes and there are proceeds remaining after paying debts of the firm and adjusting the equitable claims of the different members as between themselves, the property is treated as real estate and would be subject to curtesy.[17] Real property, devised to the wife for life, who is also heir of the testator and, by reason of remainder being void, the wife succeeds to the remainder as heir, the life estate merges into the grantee estate and her husband's interest attaches.[18] In a settlement of a dispute between husband and wife certain lands were conveyed to the husband and certain lands to the wife. The title to lands in the wife was made by transfer by husband and wife to a third person and by such person to the wife. Because the deed did not contain estoppel against the husband, he was entitled to curtesy in said lands.[19] Curtesy cannot be acquired where the husband's coverture begins and ends during the continuance of an adverse possession.[20] There are some possible phases of constructive seizin not met by present adjudications, but the limits already prescribed are likely to cover the majority of instances, where the right to curtesy could be disputed.

3. *Birth of Issue.*—Marriage, seizin and death are incidents common to both dower and curtesy, but paternity is imposed as a condition precedent to the vesting of the latter, while the former becomes the wife's right whether she has had issue or not. It is not only necessary that the wife give birth to issue, but such issue must be born alive in the life-time of the wife, and capable of inheriting from her. What is evidence sufficient to establish that the child is born alive is the subject of much difference of opinion. Blackstone declares that, in order to enable the tenant to take by curtesy, it must be proved that the child was heard to cry and that by those who actually heard it and not by those who had learned it from hearsay.[21] Lord Coke also maintained the sufficiency of

[11] 11 Barb. 437.
[12] 2 Bl. 232.
[13] 8 Paige, 634.
[14] 11 B. Mon. 138; 5 Madd. 408.
[15] 11 Barb. 44.
[16] 4 Kent, p. 50; 14 Barb. 441.
[17] 10 Barb. 44.
[18] 4 Kent, 99.
[19] 17 St. R. 648.
[20] 49 Hun, 416.
[21] 2 Black. 127.

such evidence. The pulsation of the umbilical cord and even the motion of a lip has been supposed, by some authorities, unmistakable evidence of a separate vitality. The most celebrated case, which has involved the question of the child's independent existence, was tried at the Stafford Lent Assizes in 1854. The husband brought a suit in ejectment to recover his right to curtesy in his deceased wife's realty, and burden of proof was on him to show that his wife had given birth to live issue before her death. The mother was seven months pregnant at the time of delivery. The husband averred that labor was superinduced by prolonged exercise and unusual fatigue. The plaintiff was alone with his wife, when the child was born, and on the trial gave evidence that he had heard the child cry. His sister was brought to his wife's assistance and her evidence corroborated that of the husband. The infant, however, died before being dressed. In defense the heirs offered circumstantial evidence to prove the improbability of the child's separate existence, owing to the mother's ill-health and feebleness. The defense here rested and the jury found for the plaintiff. The case was appealed and a new trial ordered. On the second trial evidence was introduced to prove that it was impossible for the child to have cried, for the reason that the wife could not have been more than five months pregnant. By circumstantial evidence the term of pregnancy was determined and the child denied existence. The jury returned a verdict for the defendant. Children born during the first six months after conception have been considered under the civil law, incapable of living, and therefore, although apparently alive, if they do not survive long enough to rebut the presumption of the law, they cannot inherit so as to transmit property to others.[22] Lord Hardewicke held that the rights of a child *in ventre sa mere* were derived from the civil law.[23] If the child be dead when born or of such premature birth as to render its existence impossible, it is then considered as if conception had never taken place.[24] But the common law makes the child *in esse*, at the moment of conception, so that it can take any estate or inherit, which will inure to its benefit.[25] If the child is taken from the mother by the Cesaerean operation after death, there is no curtesy.[26] Says Lord Coke: "If a woman seized of lands, in fee, taketh a husband and by him is big with child and in her travail dieth and the child is ripped out of her body alive, yet he shall not be tenant by the curtesy, because the child was not born during the marriage nor in the life of the wife; but in the meantime her land descended." In the early practice, the Cesaerean operation was always fatal. Now, however, the operation is frequent and the safe delivery of the child alive and the mother's recovery are, by no means, exceptions to the rule. The birth of the child may occur before or after the seizin of the wife.[27]

4. *Death of the Wife.*—Estate by curtesy becomes absolute at the death of the wife. The other conditions being present, the estate then vests in the husband. At common law aliens did not enjoy the benefits of the right, although the conditions precedent were fully observed. By legislative enactment aliens are now allowed to acquire by curtesy. The statutes for the benefit of married women have still further enlarged the wife's freedom. In those States where curtesy exists, she can dispose of her realty during her life-time by deed or devise, to the exclusion of her husband. The rule is just, but as the rigor of the ancient law has been abated in the wife's favor, it would be a mark of good judgment to further modify the old requirements and eliminate birth of issue from among the essentials necessary to the creation of the estate. Absurd as the present rule is, it has the sanction of common law and is still the important factor wherever curtesy exists. I assume to allege that there is no one to now maintain for this principle even the semblance of justice. Antiquity's sanction is the excuse for its continued existence. Why the wife's right of dower should be unconditional and the husband's right of curtesy conditional, upon the happening of a doubtful event—especially in an age when such events are growing amazingly less among women blessed with estates—is a question that

[22] Code Nap. Art. 312.
[23] 2 Ak. 117.
[24] Code Nap. Art. 725; Civ. Code La. Art. 28.
[25] 2 John. Ca. 18.
[26] 2 Paige, 35; Wash. R. P. 140.
[27] 1 Cruise Dig. 150; Co. Litt. 29*b* 30*a*.

challenges a reply. Would it not be fairer to abolish the estate outright than to hang the husband's interest upon a hazardous condition, the evidence in support of which is at best contradictory and unsatisfactory? For, be it remembered, that the doctors have not yet agreed whether a child of four months' gestation can cry aloud, or whether the infants kick, directly after birth, is a sign of its own separate life or simply the continuance of the mother's vitality. There is no reason in the present rule. Dower and curtesy are estates of a purely personal nature. They were designed for the enjoyment of the surviving partner and the conditions on which they rest should be made the same. At a time when women are clamoring for a generous hearing, it may be pertinent to observe that there is still, among the man-made laws, bearing the seal of antiquity, a provision which works a manifest injustice to the husband's acknowledged rights.

GEORGE LAWYER.

New York.

TELEGRAPH COMPANIES — NEGLIGENCE — MEASURE OF DAMAGES.

POSTAL TEL. CABLE CO. V. LATHROP.

Supreme Court of Illinois, January 21, 1890.

1. *Telegraph Companies—Negligence in Transmitting Message—Measure of Damages.*—Where a message, as written, when read in the light of well known commercial usage, reasonably informs the operator that it is one of business importance, and discloses the transaction so far as is necessary to accomplish the purpose for which it is sent, the company, in the absence of a legal excuse, is liable for all the direct damages resulting from a negligent failure to transmit the message as it is written, within a reasonable time.

2. *Case Stated.*—The above rule was applied to the following message: "Buy in addition to 1,000 August, 1,000 cheapest month. Put stop order on 5,000 Dec. at 17 cents," there being evidence to show that the company, from previous transactions, ought to have understood the meaning of the message.

3. *Instruction—Resume of Evidence — Harmless Error.*—A long instruction reviewing the evidence, while it violates good practice, is harmless, if it contains a fair statement of the evidence.

Action on the case brought by Charles D. Lathrop and Luther C. Marley against the Postal Telegraph Cable Company on account of mistakes in transmitting two telegrams. The first message read: "Please buy in addition to thousand August, one thousand cheapest month." As delivered, it read: "Please buy in addition, two thousand August, one thousand cheapest month." The second message was: "Put stop order on five thousand Dec. at seventeen cents, this order good until countermanded." As delivered, it read "seventy" in place of "seventeen." Plaintiffs obtained judgment, which was affirmed by the appellate court. Defendant appeals.

WILKIN, J.: * * * The controlling question in the case, so far as we are at liberty to pass upon it, arises on the refusal of the trial court to give the third instruction asked by appellant, as follows: "(3) The jury are instructed that the defendant is only liable for such damages, if any, as were actually contemplated, or which might reasonably be supposed to have been contemplated, by the parties in the delivery and receipt of the messages in the transmission of which the alleged errors occurred; and if the jury believe from the evidence that such messages were not sufficiently clear or precise to inform the agents of the defendant receiving them of their meaning, and of the possible risk and damage which might result from mistakes in their transmission, and that such facts were not disclosed by the plaintiffs to the defendant or its agent, then the defendant cannot be charged with having contemplated the special damages claimed, by the plaintiffs in this action, and plaintiffs are only entitled to recover the amount actually paid by them for the sending of such messages, with interest at 6 per cent. from the date of payment to the date of your verdict." It is earnestly contended by counsel for appellant that the messages, "Please buy in addition to one thousand August, one thousand cheapest month," and "Put stop order on five thousand Dec. at seventeen cents," were unexplained, meaningless and unintelligible to the operator of appellant who transmitted them; and therefore, as in case of cipher dispatches, no special or consequential damages could have been reasonably contemplated by the parties when they were sent, and hence none can be recovered in this suit. This position is based on the rule of damages announced in Hadley v. Baxendale, 9 Exch. 341, and followed generally in this country as well as in England. In any view of that rule, as applied to this case, the instruction is too narrow. The evidence shows that at the time of sending these dispatches appellees were, and had for some time prior thereto been engaged, in the business of jobbers in coffee, tea, and sugar in the city of Chicago; that Crofman & Bro. were commission merchants in New York, buying and selling coffee, rubber and hides on commission; that appellant had a branch office near the place of business of appellees, from which the messages in question were sent, and had frequently sent others pertaining to their business. It also tends to show that from business transactions in New York between appellant and the firm of Crofman & Bro. appellant knew the business in which the latter firm was engaged. It is in proof that during the month of June, 1887, and prior to the first mistake com-

plained of, a number of dispatches were sent by appellees to Crofman & Bro. from appellant's Chicago office. One on the the 13th read: "Please wire us to-day whether you do or do not execute an order for five thousand bags, as we must place it elsewhere if you decline." Another of the same date refers to "five thousand bags." It must, at least, be conceded that there is evidence tending to show that from their previous dealings appellant knew, or might by reasonable diligence have understood, the purport of these messages. Therefore, in determining whether or not the messages were sufficient to inform the operator of their meaning, and of the possible risk of loss to appellees by a mistake in transmitting them, the jury should have been left free to consider all the facts and circumstances proved in the case bearing on that question, whereas the instruction limits the inquiry to that which appears in the dispatches themselves, and to such facts as may have been disclosed by the plaintiff to the defendant or its agent at the time they were sent. See 2 Thomp. Neg. 857.

On the question as to how far mere indefiniteness in the language of a message will defeat a recovery for consequential damages against a telegraph company, the decisions cannot be said to be harmonious. Counsel for appellant contends that the better line of authorities sustains the rule announced in this instruction, viz., that the operator who transmits a message must be able to understand its meaning as to quantity, quality, price, etc., as the sender and party to whom it is sent themselves understood it; otherwise it is said he cannot reasonably be supposed to have contemplated damages as the probable consequence of a failure to correctly transmit it. While some of the cases cited go to that extent, especially where the message is in cipher, another line of decisions, and we think founded on the better reasons, hold that where enough appears in the message to show that it relates to a commercial business transaction between the correspondents it is sufficient to charge the company with damages resulting from its negligent transmission. In Telegraph Co. v. Wenger, 55 Pa. St. 262, a message read; "Buy fifty (50) North Western fifty (50) Prairie du Chien, limit forty-five (45)." There was a delay by the telegraph company in its delivery, resulting in a loss to the sender on account of the advance in price of Chicago & Northwestern Railway Company stock and the Milwaukee & Prairie du Chien Railway Company stock, which the message was intended to order purchased. The supreme court of Pennsylvania sustained a recovery, saying: "The dispatch was such as to disclose the nature of the business to which it related, and that the loss might be very likely to occur if there was a want of promptitude in transmitting it, containing the order." In Tyler v. Telegraph Co. 60 Ill. 421, the message was: "Sell one hundred (100) Western Union. Answer price." The message as delivered, read, "Sell one thousand (1,000)," instead of "one hundred, (100)." The message was intended as an order to sell 100 shares of stock in Western Union Telegraph Company. The agent, obeying the order as delivered, sold 1,000 shares of said stock, and to fill the order was compelled to buy 900 shares. We held that the plaintiff was entitled to recover the difference between the price for which the shares of stock were sold and that which he was compelled to pay for those purchased. On the question as to the sufficiency of the dispatch to inform the agent of the transaction to which it referred so as to charge the telegraph company with resulting damages, the rule announced in Telegraph Co. v. Wenger, *supra*, was approved, and it was held that the dispatch disclosed the nature of the business as fully as the case demanded. On a second appeal (74 Ill. 168) by general language the decision is reaffirmed. In Telegraph Co. v. Griswold, 37 Ohio St. 302, a dispatch read: "Will you give one fifty for twenty-five hundred at London? Answer at once as I have only till to-night." As delivered, it read "one five" instead of "one fifty," as written. It was an inquiry whether the sender would pay 150 in gold for 2,500 bushels of flax-seed at London, Ontario, the parties having previously corresponded on the subject. The sender replied to the dispatch as received, ordering the purchase, and recovered from the telegraph company the difference in price. On appeal to the supreme court, it was contended as it is here, that the message was indefinite, and therefore the recovery below unauthorized. But the court said: "It appeared upon its face that it related to a business transaction,—a transaction involving the purchase and sale of property. The company was therefore apprised of the fact that a pecuniary loss might result from an incorrect transmission of the message. Where this appears, there is no such obscurity as relieves the company from liability for negligently failing to transmit and deliver the message in the language in which it was received." In Marr v. Telegraph Co., 1 Pickle, 530, 3 S. W. Rep. 496, a message was delivered to the company reading: "Buy one hundred shares Memphis and Charleston." As delivered it read: "Buy one thousand shares Memphis and Charleston." The recovery for consequential damages was sustained, the supreme court of that State saying: "This message was so written that the slightest reflection would enable the operator, who understood its transmission, to see its commercial importance, and put him on his guard against error." In Telegraph Co. v. Blanchard, 68 Ga. 299, the message sent read: "Cover two hundred September one hundred August." By an error in its transmission, as received it read 200 August instead of 100. As sent, it was an order to sell 100 bales of cotton for August delivery, and 200 for September delivery. The agent sold 200 bales for August, and plaintiff was compelled to buy 100 at a loss in order to meet the sale. A recovery for this loss was sustained by the supreme court of that State, in the following language: "As to the fifth

ground in the request to charge we do not see but what the message sought to be transmitted was, according to the proof, an ordinary commercial message, intelligible to those engaged in cotton dealing; and we can see no such special purpose intended by the sender, which was unknown to the company, as to vary the rule of liability. There was at least enough known to show it was a commercial message of value, attached to the message, and that is sufficient." See, also, Squire v. Telegraph Co., 98 Mass. 232; Pepper v. Telegrah Co., (by the Supreme Court of Tennessee), 11 S. W. Rep. 783; 3 Suth. Dam. 301.

All the cases which hold that a telegraph company is not liable for consequential damages for a failure to transmit a dispatch as received on the ground of indefiniteness or obscurity in the language of the message, do so upon the ground that unless the agent of the company may reasonably know from the message itself, or is informed by other means, that it relates to a matter of business importance, he cannot be supposed to have contemplated damages as a result from his failure to send it as written, as in the case of cipher dispatches. The Supreme Court of Wisconsin in Candee v. Telegraph Co., 34 Wis. 472, say: "The operator who receives and who represents the company, and may for this purpose be said to be the other party to the contract, cannot be supposed to look upon such a message as one pertaining to transactions of pecuniary value and importance, and in respect to which pecuniary loss or damages will naturally arise in case of his failure or omission to send it. It may be a mere item of news, or some other communication of trifling and unimportant character." It is clear enough that, applying the rule in Hadley v. Baxendale, *supra*, a recovery cannot be had for a failure to correctly transmit a mere cipher dispatch, unexplained, for the reason that to one unacquainted with the meaning of the ciphers it is wholly unintelligible and nonsensical. An operator would therefore be justifiable in saying it contains no information of value as pertaining to a business transaction, and a failure to send it, or a mistake in its transmission, can reasonably result in no pecuniary loss. The messages in this case, however, are not cipher dispatches, Their language is plain and intelligable to every one who can read, so far as they purport to disclose the business to which they relate. They are abbreviations, and clearly indicate that they relate to business transactions between the sender and the sendee. The first message, "Please buy in addition to one thousand August one thousand cheapest month," was notice to the agent at Chicago that appellee was ordering the agent in New York to purchase merchandise for them. We do not agree with counsel in saying that it might as well be construed to be an order "for a thousand of toothpicks or a thousand papers of pins as anything else." Every one of intelligence knows that such articles are not purchased in that way. Suppose, however, that the agent was not informed as to the quantity, quality, and value of the merchandise to be purchased by the message, would that justify him in contemplating, within the rule in the Hadley Case, *supra*, no damages as a result of his negligence or omission of duty in promptly and correctly sending it forward? It certainly cannot be contended that the agent must be informed of all the facts circumstances pertaining to a transaction referred to in a telegram, which are known by the parties themselves, to make his company liable for more than nominal damages. If it should be so held, the telegraph would cease to be of practical utility in the commercial world.

It is not easy to state a case in which it can be said the parties contemplated, at the time of contracting, all the damages which will probably result from a failure to perform the contract. We think the reasonable rule, and one well sustained by authority, is that where a message as written, read in the light of well-known usage in commercial correspondence, reasonably informs the operator that the message is one of business importance, and discloses the transaction so far as is necessary to accomplish the purpose for which it is sent, the company should be held liable for all the direct damages resulting from a negligent failure to transmit it as written, within a reasonable time, unless such negligence is in some way excused. Under this rule, both dispatches as presented to appellant's operator were sufficiently explicit to charge it with the loss sustained by appellees, resulting from what has been found by the jury to be its inexcusable mistakes. * * *

NOTE.—The general rule in regard to the measure of damages in actions against telegraph companies for their negligent failure to correctly transmit and seasonably deliver messages intrusted to them is that the damages recoverable are such only as the parties may fairly be supposed to have contemplated when they made the contract.[1] But it is not necessary that they should, in reality, have actually contemplated the violation of the contract and the exact damage thereby caused, for, as it is well said in a New York case, "parties entering into contracts usually contemplate that they will be performed, and not that they will be violated."[2] It is sufficient, therefore, if the damages are such as proximately result from the negligence of the company and may be presumed to have been contemplated, or would have been contemplated if the attention of the parties had been called to the matter at the time of making the contract.[3]

In actions for special damages, as distinguished

1 "Telegraphs and Liability of Telegraph Companies," 2 Cent. L. J. 131, *et seq.*; "Law of Telegraphs," 2 Cent. L. J. 198; Hadley v. Baxendale, 9 Exch. 341; U. S. Tel. Co. v. Gildersleeve, 29 Md. 232; Manville v. W. U. Tel. Co., 37 Iowa, 214, 18 Am. Rep. 8; W. U. Tel. Co. v. Shotter, 18 Cent. L. J. 230; Bodkin v. W. U. Tel. Co., 31 Fed Rep. 134; Parks v. Alta Tel. Co., 13 Cal. 422; First Nat. Bank v. Tel. Co., 30 Ohio St. 555; and authorities cited in the principal case.

2 Leonard v. N. Y., etc. Tel. Co., 41 N. Y. 544, 1 Am. Rep. 446.

3 Smith v. W. U. Tel. Co., 83 Ky. 104, 4 Am. St. Rep. 126; Leonard v. N. Y., etc. Tel. Co , 41 N. Y. 544; Squire v. W. U. Tel. Co., 98 Mass. 232; True v. Internat. Tel. Co., 60 Me. 9.

from actions for a statutory penalty, the plaintiff must prove his special injury and resulting damages in order to secure more than mere nominal damages.[4] But in Kansas, it has been held that exemplary damages may be recovered where there is a wilful or malicious failure to transmit and deliver a proper message.[5] There are also cases in which damages have been recovered for injuries to feelings and mental anguish resulting from the negligent failure of the telegraph company to properly transmit and deliver a a message.[6] These cases depend upon peculiar circumstances, such as the fact that the plaintiff was prevented from being present during the last illness, at the death or at the funeral of a near and dear relative, or the like, and they are therefore exceptional rather than antagonistic to the general rule. It is obvious, however, that injury to the feelings cannot be taken into consideration as an element of damages in ordinary cases. Indeed, it would seem upon principle that it ought not to be considered in any case unless there is something in the nature of the message or the surrounding circumstances from which it can be presumed that the company contemplated or ought to have contemplated the mental suffering as a natural result of their negligence.

Where a message is in cipher, the meaning of which is unknown to the operator, or is so obscure that it conveys no idea of its importance to him, the company will be liable only for nominal damages, or the price paid for its transmission, unless it is notified of the importance of the message, or unless, as in the principal case, the company ought to know of its importance from prior dealings with the same parties, from well established business usages, or from other circumstances of which it has or ought to have notice.[7] But telegraph operators have often been held to a knowledge of what would be unintelligible to one not versed in the customs of merchants and the forms and language used by them in sending telegrams, even to the extent of making the company liable for negligence in sending cipher messages.[8]

In the following cases the company was held liable for the actual damages sustained by the plaintiff: Where the message, as written, read "two hand bouquets," and, as delivered, read "two hundred bouquets;"[9] where an order for five thousand "sacks" of salt was changed to an order for that number of "casks;"[10] where an order for "one shawl" was delivered as an order for "one hundred shawls;"[11] so in many other cases where mistakes were made by the company in the number or price of articles ordered by telegram.[12] The same rule applies where the company fails entirely to deliver a message, and it will be held liable for all damages actually sustained and proximately resulting from its negligence wherever the message is such on its face or the surrounding circumstances are such that the parties may be presumed to have contemplated such damages.[13]

In each of the following cases it was held that the message itself was sufficiently explicit to apprise the company of its importance: Where the message read "car cribs six sixty, c. a. f., prompt," and was sent in reply to a telegram for quotations in regard to car cribs;[14] where the message read "cover two hundred September, one hundred August;"[15] where it read "ten cars new two whites Aug. shipment, fifty-six half;"[16] so where the message read "ship cargo named at 90, if you can secure freight at 10,"[17] and in many similar cases.[18]

In the following cases nominal damages only were held recoverable: Where the owner of an oil well for which he had been offered a certain price, having telegraphed to his agent to let him know "what that well is doing," sold his well for much less than it was worth because he had not heard from the agent, who did not receive the message;[19] where the telegram read "Willie died yesterday evening at six o'clock. Will be buried at Marshall Sunday morning."[20] So where B telegraphed to the plaintiff for five hundred dollars, and the message as delivered called for five thousand dollars, which sum was sent, and with which B absconded, it was held that the company was not liable for the loss, because its negligence was not the proximate cause thereof.[21] And where orders for wheat, oil, or any particular kind of produce are delayed by the company until it is too late to buy at the prices named and the market fluctuates, the mere fact that the price at one time exceeds that at the time the order should have been delivered, will not render the company liable for the difference, for the courts will not presume that, if purchased, it would have been sold at exactly the right time to make a profit.[22]

The rules above laid down and the cases cited show generally under what circumstances actual damages may be recovered and under what circumstances mere nominal damages can be recovered. It is often diffi-

[4] Little Rock, etc. Tel. Co. v. Davis, 41 Ark. 79; Cutts v. W. U. Tel. Co., 71 Wis. 46.

[5] West v. W. U. Tel. Co., 39 Kan. 93, 7 Am. St. Rep. 530.

[6] Wadsworth v. W. U. Tel. Co., 86 Tenn. 695, 6 Am. St. Rep. 864; Loper v. Tel. Co., 70 Tex. 689: W. U. Tel. Co. v. Cooper, 71 Tex. 507, 10 Am. St. Rep. 772. *Contra:* Russell v. Tel. Co., 3 Dak. 315; West v. W. U. Tel. Co., 39 Kan. 93.

[7] Candee v. W. U. Tel. Co., 34 Wis. 471, 17 Am. Rep. 452; Mackay v. Union Tel. Co., 16 Nev. 222; Daniel v. W. U. Tel. Co., 61 Tex. 452, 48 Am Rep. 305; Cannon v. W. U. Tel. Co., 100 N. C. 300, 6 Am. St. Rep. 590; Behm v. Tel. Co., 8 Biss. 131; Sanders v. Stuart, 3 Cent. L. J. 557.

[8] Thomp. on Neg. 857; Pepper v. W. U. Tel. Co., 87 Tenn. 554, 10 Am. St. Rep. 699; W. U. Tel. Co. v. Hyer, 22 Fla. 637; Daugherty v. Am. Un. Tel. Co., 18 Cent. L. J. 428, 75 Ala. 168, 51 Am. Rep. 435; W. U. Tel. Co. v. Blanchard, 68 Ga. 299; Hart v. W. U. Tel. Co., 66 Cal. 579.

[9] N. Y., etc. Tel. Co. v. Dryburg, 35 Pa. St. 298, 78 Am. Dec. 338.

[10] Leonard v. N. Y., etc. Tel. Co., 41 N. Y. 544, 1 Am. Rep. 446.

[11] Bowen v. Lake Erie Tel. Co., 1 Am. L. Reg. 685.

[12] Tyler v. W. U. Tel. Co., 60 Ill. 421, 14 Am. Rep. 38; Bartlett v. W. U. Tel. Co., 62 Me. 209; W. U. Tel. Co. v. Shotter, 71 Ga. 760.

[13] U. S. Tel. Co. v. Wenger, 55 Pa. St. 262; True v. Inter. Tel. Co., 60 Me. 9, 11 Am. Rep. 156; Sprague v. W. U. Tel. Co., 6 Daly, 200, 67 N. Y. 590; W. U. Tel. Co. v. Reynolds, 77 Va. 173.

[14] Pepper v. W. U. Tel. Co., 87 Tenn. 554, 10 Am. St. Rep. 699.

[15] W. U. Tel. Co. v. Blanchard, 68 Ga. 299, 14 Cent. L. J. 331.

[16] W. U. Tel. Co. v. Harris, 19 Ill. App. 347.

[17] True v. Internat. Tel. Co., 60 Me. 9, 11 Am. Rep. 156.

[18] Rittenhouse v. Independent Line of Tel., 44 N. Y. 263, 4 Am. Rep. 673; Milliken v. W. U. Tel. Co., 27 Cent. L. J. 577; Mowry v. Tel. Co., 51 Hun, 126; Hadley v. W. U. Tel. Co., 115 Ind. 191; W. U. Tel. Co. v. McKibben, 114 Ind. 511; Thompson v. W. U. Tel. Co., 64 Wis. 531.

[19] Baldwin v. U. S. Tel. Co. 45 N. Y. 744.

[20] W. U. Tel. Co. v. Brown, 71 Tex. 723.

[21] Lowery v. W. U. Tel. Co., 60 N. Y. 198, 19 Am. Rep. 154. See also First Nat. Bank v. Tel. Co., 30 Ohio St. 555.

[22] Hubbard v. W. U. Tel. Co., 33 Wis. 558, 14 Am. Rep. 775; W. U. Tel. Co. v. Hall, 124 U. S. 444; Pennington v. W. U. Tel. Co., 67 Iowa, 631, 56 Am. Rep. 367; Smith v. W. U. Tel. Co., 83 Ky. 104, 4 Am. St. Rep. 126. See also W. U. Tel. Co. v. Crall, 39 Kan. 580; W. U. Tel. Co. v. Graham, 1 Colo. 230.

cult, however, to determine just what shall be the measure of the actual damages, and a consideration of some of the cases upon this branch of the subject seems desirable. The Supreme Court of Indiana have recently decided two interesting cases upon this subject. In one the court held that the company was liable for the loss of weight of cattle caused by the failure of the company to deliver the telegram promptly.[23] In the other the plaintiff had applied to a manufacturing company for a situation, directing them to notify him by telegraph in case of a vacancy, and it was held that the telegraph company, having failed to deliver the message, was liable to him for the sum offered to him for his services, which were to be paid by the day, from the time the message was sent to the date of bringing the action, excluding Sundays, and deducting money which he earned or might have earned at other employment by the exercise of reasonable diligence.[24] In another case a party telegraphed from Chicago to Oswego to send five thousand *sacks* of salt, and the company, having sent the message for five thousand *casks* of salt, was held liable for the difference between the market value at Chicago and Oswego, together with the cost of transportation.[25] In a Georgia case it was held that the measure of damages where the company had negligently changed the price in transmitting an order for certain articles was not the difference between the price named and the price as altered by the company, but was the difference between the price as stated by the company and the market value of the goods at the place of delivery at that time.[26] In a case which arose in New York, the plaintiff had sent a message to an attorney at B to hold his case over a certain time and to reply. The company failed to deliver the message, and the plaintiff, thinking the attorney had been unable to obtain a continuance, went with his counsel to B, where he found that the case had already been continued, in consequence of which he was compelled to make another trip. It was held that he could recover the expenses of himself and counsel on the first trip, together with the fee which he had been compelled to pay his counsel for making the trip.[27]

The general subject of the liability of telegraph companies does not come within the purview of this note, and it has already been treated in most of its phases in several leading articles which have heretofore appeared in this journal.[21]

Indianapolis, Ind. W. F. ELLIOTT.

[23] Hadley v. W. U. Tel. Co., 115 Ind. 191.

[24] W. U. Tel. Co. v. McKibben, 114 Ind. 511.

[25] Leonard v. N. Y. Tel. Co., 41 N. Y. 544, 1 Am. Rep. 446. See also Tyler v. W. U. Tel. Co., 60 Ill. 421; U. S. Tel. Co. v. Wenger, 55 Pa. St. 262, 93 Am. Dec. 751; Washington, etc. Tel. Co. v. Hobson, 15 Gratt. 122; Manville v. W. U. Tel. Co., 37 Iowa, 214, 18 Am. Rep. 8.

[26] W. U. Tel. Co. v. Shotter, 18 Cent. L. J. 230.

[27] Sprague v. W. U. Tel. Co., 6 Daly, 200, 67 N. Y. 590.

[28] See 14 Cent. L. J. 386; 15 Cent. L. J. 182; 2 Cent. L. J. 198, 731. See also the case of Milliken v. W. U. Tel. Co., 27 Cent. L. J. 577, where it is held that a person may contract with a telegraph company to have a message delivered to him, which is addressed to him by a fictitious name, and the company will be liable for failure to deliver it according to the contract.

CORRESPONDENCE.

EXEMPTION FROM TAXATION OF EDUCATIONAL INSTITUTIONS.

To the Editor of the Central Law Journal:

Mr. Geo. M. Sayles in the issue of this week (p. 398) makes a criticism of my article on page 284, Vol. 30. First. He injects "even temporarily," into my language and then asks me to construe. That is not what I said, so I can neither affirm nor deny the doctrine thus expressed. But I do stand by what I did say, which has abundant authority to support it, as Bro. Sayles can see by looking up the authority cited by the appellant's attorney in 98 N. Y. 121. Second. No conflict exists between 19 Ohio, 110, and 98 N. Y. 121. Bro. Sayles becomes somewhat sentimental on "a worthy" and striving "society," but the law does not deal in sentiment.

D. H. PINGREY.

JETSAM AND FLOTSAM.

CHAUNCEY M. DEPEW AT THE SUPREME COURT CENTENNIAL BANQUET.—May it please the Court: Except I had been specially retained to close these exercises, I should not take part in the animate pantomime which has interested you this evening. I have discovered, however, that in an audience of 800 the man who speaks last is surest of his crowd. While the speaking on the platform never ends, the audience is talked out. Uninterrupted conversation by 800 people with each other has left them with no topic interesting to the man next to them. The elaborate oration which I had prepared to deliver at 10 o'clock I shall not get off at 1. It is a reversal of the process of nature to have the toast to the clients close this entertainment. Pyramids are not built in that way. [Applause.]

The client is the foundation upon which we all rest. Clients are the superstructure of the Bench and the Bar. The client bears the burden of this foundation as well as he can, and the superstructure bears it with cheerfulness. [Laughter.] If the founders of the judiciary system of the United States had known that in a hundred years their successors in office would be subjected to the wisdom and the wit and the humor which they have had for twelve hours to-day, that system would not have been perfected. [Laughter.]

But at this hour of the night wisdom is tired, wit is weary and humor is asleep. It is fitting that these thirteen years of centennial celebration should close with the judiciary. They always get in at the close. [Applause.] Not that we are to-night to divide up the estate of the republic, or to administer upon it, but we are here to celebrate our pleasure.

These centennial celebrations began fully thirteen years ago at Concord and Lexington, and every incident relating to the revolutionary war, relating to the Declaration of Independence, relating to the formation of the constitution, has been elaborately celebrated, but the judgment of the world could never have been rendered that the republic wes complete until the judiciary had been founded. [Applause.]

Our clients. I am on both sides. I have discovered as a railway lawyer that when the corporation wishes to limit the fees of the counsel they elect him president. [Loud applause.] I have discovered as a political observer that when a lawyer wishes to rise to

the highest political distinction he declines railway fees. Not foreseeing the future and not wishing to do any harm to the party I belong to, eight or ten years ago I tendered a fee which should be an annual one to a Buffalo lawyer, which he declined on the ground that he had fees enough. It made him President of the United States. [Applause.]

We hear much of the humor of the Bar, and we see more of it. At a judicial dinner in London, I told a story of a lawyer by the name of Strange, who was dying, and requested his wife that she would put nothing upon his tomb except "Here lies an honest lawyer." His wife said: "That is strange." [Laughter.] "Well," said he, "my dear, that is what every visitor to the cemetery will say." [Laughter.]

The next night a friend of mine was at another judicial dinner, and a distinguished jurist said there was a comical American lawyer whom he met last night, and he told them a monstrously amusing story about an American barrister whose name I now forget, but that is not essential to the story [laughter,] who asked his wife to put upon his tombstone, "Here lies an honest barrister;" those American lawyers are comical fellows.

WITNESSES—INCAPACITY OF HUSBAND AND WIFE TO TESTIFY FOR EACH OTHER.—The rule of common law which disables husband and wife from testifying for or against each other is a stupid and barbarous relic which ought to be done away with as soon as possible. The limit of the rule of exclusion should be that neither should be allowed to testify to matters which have passed between them in the intimacies of the conjugal relation, against the objection of the other conjugal partner. Beyond this, everything affecting the quality of such evidence should go to its credibility. The view here expressed is well illustrated by the recent decision of the St Louis Court of Appeals in Kennedy v. Ballard, not yet reported. In that case a man erected a hotel upon his lot in a city, under an agreement with the owner of the adjoining lot that the wall next to the adjoining lot should be upon the boundary line and that the owner of the lot adjoining would pay one-half of the cost of building the wall. The wall was built. The adjoining lot owner paid $50 of the cost of building it, and then refused to pay any more. Subsequently the party who had built the wall assigned the right of action for this contribution to his wife and thereafter the wife (the husband being joined for conformity), brought a suit in the nature of a suit in equity to recover of the adjoining lot owner what remained unpaid of his share of the cost of the party wall. Now, it so fell out that the husband was the only person who know the fact of the contract, and he offered to testify concerning it, and also to the fact that, during the progress of the work, the defendant had been present frequently and had made suggestions concerning it. This evidence was ruled out, under the rule of the common law, which has been abrogated in Missouri only to a limited extent by statute. R. S. Mo. 1879, § 4014. In this case, if the husband had not assigned the cause of action to his wife he would have been perfectly competent to deliver the evidence which was tendered.—*American Law Review.*

A NEW FEATURE IN LEGAL JOURNALISM.—The *American Law Review* is to be credited with a new "feature" in legal journalism—a new mouth, so to speak. It has revived the swearing parson of the time of Fielding. A new contributor, the Rev. W. H. Bailey, makes his *debut* in its pages. It is noteworthy that he is none of your puritanic precisians; he has no narrow prejudice against the stage nor against the introduction of familiar reference to that place of abode which a merciful Providence is reported by some to have prepared for the devil and his angels and those bad human beings from the beginning predestined, foreordained and elected thereunto. He disports himself in a dramatic dialogue between an absent-minded judge and a coarse-mouthed sheriff, without much point, but with a number of h——s. At first we were inclined to be a little envious of our contemporary on account of this novel acquisition, but on reflection we are content to give the *Review* a monopoly of him. But we venture to suggest to the reverend contributor that it would be more decorous in him to drop his h——s or the "Rev."—*Albany Law Journal.*

OHIO REPORTS.—Vol. 46, Ohio State Reports, is out. It embraces the opinions handed down by the court during the period from about October, 1888, to February, 1890. This is probably a longer period than is covered by the volumes of the Reports for a number of years past. It is obvious that the court has only given written-out opinions in the most important cases, but while fewer opinions were written out, the court has devoted the time and labor thus saved to the consideration of a larger number of cases on the general docket. The fact is that the court has been very hard at work during the last year, and has worked with a zeal which deserves and ought to receive the fullest recognition by the bar and the public generally. We should not be surprised if the number of cases on the general docket disposed of in the period from the last to the next summer vacation would be nearly, if not fully, twice as large as the average for years before.—*Ohio Law Journal.*

RECENT PUBLICATIONS.

THE COMPLETE DIGEST. A DIGEST OF ALL THE REPORTED AMERICAN CASES AND SELECTED ENGLISH CASES, with Synopses of Statutes of General Interest, Reference to articles and Essays in Current Law Periodicals, and to Text-books and other matters of Value to the Profession, contained in the various Law Publications, from January-June, 1889; July-December, 1889. Editors: E. A. Jacob, J. A. Mallory, F. B. Walrath. Associate Editors: W. G. Challis, G. T. Lincoln, M. Cooper, W. Hall, D. Walworth. 1889. Parts I, II. New York: Digest Publishing Co., Publishers. 1889.

An examination of these volumes will prove a revelation to those who have not had occasion to use them. They are, to our mind, the perfection of legal digests. We say this, not after a cursory glance at their contents, but by reason of a practical and constant use since their receipt. The volumes before us embrace all the decisions rendered during the year 1889. They contain references not only to the West Publishing Company series of reporters, but also references to the pages and volumes of the State reports, the same being obtained from advance sheets. To each case is also appended a reference to journals and magazines in which it may have appeared and in connection therewith articles or annotated cases on the same subject in the legal journals. All important English cases are also given. The digests of the cases are full and accurate, and systematically arranged under appropriate headings. There appears also a list of cases criticised, disapproved, overruled or reversed during the year. This series of digests began in 1887.

The year following, purchase was made of volume 19 U. S. Digest, new series, which embraced the official reports for 1888, and by that purchase became the complete digest for 1888. The fact that so soon after the expiration of the year a digest so complete and satisfactory has been prepared shows enterprise which is deserving of encouragement. The printing and binding of these volumes is first class.

Books Received.

THE FORUM, edited by Lorettus S. Metcalf, May, 1890. I. Republican Promise and Performance. J. G. Carlisle. II. Canada through English Eyes. Prof. Goldwin Smith. III. The Sufficiency of the New Amendments. R. A. Pryor. IV. Literary Criticism. Archdeacon F. W. Farrar. V. The Coinage of Silver. Frederick A. Sawyer. VI. Bible Instruction in Colleges. Rev. B. W. Bacon. VII. Jury Verdicts by Majority Vote. Sigmund Zeisler. VIII. The Naval Battle of the Future. Lieut. B. A. Fiske. IX. Woman's Intuition. Grant Allen. X. Government by Rum-sellers. Rev. Howard Crosby. XI. When the Farmer Will Be Prosperous. C. Wood Davis. New York: The Forum Publishing Co., 253 Fifth Ave.

QUERIES.

Query No. 16.

B kept a stallion, and F owning a mare desiring to secure the services of the stallion, the owners entered into the following agreement: F was to pay B $50 for the services of the stallion within two weeks from the time of service; if not paid then B was to have a half interest in the progeny. The $50 dollars was not paid. Before foaling, F sold the mare to S. Several weeks after the colt was born B brings an action in trover against S to recover one-half of the value of colt. Can he recover?

QUERIES ANSWERED.

Query No. 6.

[*To be found in Vol. 30, Cent. L. J. p. 62.*]

The lien of B is subject to that of A and a levy and sale under the judgment of B in nowise affects the lien of A. The holder of the elder lien may at any time, during the life of his lien, sell the land previously sold under the junior judgment. The sale of lands under a junior judgment passes title subject to all prior liens. Lathrop v. Brown, 23 Iowa, 40; Rankin v. Scott, 12 Wheat. 177; Littlefield v. Nichols, 42 Cal. 372. But in one State at least, it seems that the senior judgment takes the proceeds though the sale is under the junior. Jones v. Wright, 60 Georgia, 384.

Query No. 9.

[*To be found in Vol. 30, Cent. L. J. p. 102.*]

It seems clear that there was a novation of the contract so far as A, B and C are concerned, and that B accepted C as his debtor in place of A, but does not appear to have accepted D. B must look to C or D for payment. See 1 Parsons on Contract, ch. 13.

Query No. 11.

[*To be found in Vol. 30, Cent. L. J. p. 231.*]

The mechanic's lien law applies to the erection of a church. Presbyterian Church v. Allison, 10 Pa. St. 413. Whether the pews are subject to lien depends upon the question whether they are fixtures and permanently affixed to the freehold, and that depends upon the circumstances and law of each case. We should say that here the pews were subject to lien, but a California case holds that "seats" in a dancing hall are not so. See Lothian v. Wood, 55 Cal. 159.

Query No. 12.

[*To be found in Vol. 30, Cent. L. J. p. 231.*]

The law as stated in the case mentioned we think somewhat broad and in its entire scope hardly justified by the authorities. A railroad company is bound to exercise care in the selection and retention of its servants, and if his incompetency is discovered is bound to discharge him. The duty of a master in the selection and retention of a servant is to some extent like that in reference to machinery. And yet, he is bound to keep up a vigilant inspection of the latter in order to free himself from liability for defects. But in the case of a servant, there is not the same tendency to wear out and become defective, and therefore, the master is not required to exercise the same diligence. But where reasonable notice of the incompetency of the servant comes to the master, he retains him at his peril—the fact of the retention being thereafter evidence of negligence. This is not a hardship, as viewed by the Indiana court, for the company may simply lay him off pending an investigation. See cases cited in 2 Thompson on Negligence, p 984.

Query No. 13.

[*To be found in Vol. 30, Cent. L. J. p. 250.*]

From the terms of the statute it would seem to us that the widow is responsible only for the "damages" she "recovers," and that in the purview of the statute she has sole control and authority of the suit, and may in her discretion compromise the judgment obtained, the minor children simply being entitled to their share upon distribution of what "damages are "recovered." We have not all the facts sufficiently before us to give a more satisfactory answer.

HUMORS OF THE LAW.

Under the law of New York, the parsonage or residence of the clergyman is exempt from taxation. A Chicago lawyer who received his license in New York, writes to *The Law:*

The young man who sat next to me in the examination was asked: "What do you understand by 'benefit of clergy?'"

He answered, after a moment of meditation: "Exemption from taxes and a pass on the New York Central railroad!"

He is now practicing law in Indiana.

JUDGE: Mr. State's Attorney, before you can introduce this witness you must show the loss of the record.

State's Attorney: I presumed your Honor was aware of the fact that the records of Marion county were burned.

Judge: As a private citizen I do know the fact, but as the court I do not, and you must put the proof of the fact into your case.

State's Attorney Well your Honor, it strikes me a little singular that your Honor knows something off the bench, and don't know anything on it.—*The Green Bag.*

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions.

1. ADVERSE POSSESSION.—An action for the possession of land will not be barred by an occupancy by defendant for more than twenty years before the commencement of the suit, if defendant did not during that time dispute the title of plaintiff, or claim any title in himself.—*Maple v. Stevenson*, Ind., 23 N. E. Rep. 854.

2. APPEAL—Rehearing.—If the opinion of the supreme court on an appeal does not discuss, or in express language determine, any particular point in a case, its attention should be called to it by a petition for a rehearing; otherwise a judgment of affirmance must be taken to have determined all the questions below. — *Gray v. Dickinson*, Ky., 13 S. W. Rep. 209.

3. APPEAL—Review.—A general objection to the introduction of any evidence under a complaint, on the ground that the facts therein stated do not constitute a cause of action, will not be considered, on appeal, when evidence was received, without specific objection, to prove the allegations, wanting in the complaint. — *Bowman v. Eppinger*, N. Dak., 44 N. W. Rep. 1000.

4. ATTACHMENT — Partnership. — Under Mansf. Dig. Ark. § 309, the wrongful act of one partner, in the conduct of partnership business, which would warrant an attachment against his property, would not authorize an attachment against the individual property of the other partner, who did not participate in the wrongful act.—*Worthley v. Goodbar*, Ark., 13 S. W. Rep. 216.

5. ATTORNEYS—Disbarment. — Consideration of facts to support charge of disbarment of an attorney.— *In re Disbarment of Luce*, Colo., 23 Pac. Rep. 300.

6. BANKS — Collection. — A check drawn on plaintiff was indorsed, "For collection," and handed defendant to be collected. The same day, defendant's agent indorsed it in his own name, and presented it to plaintiff, and received the money, which was delivered by defendant to the party from whom it received the check. It was subsequently discovered that the check had been raised before it came to the hands of defendant's correspondent: *Held*, that defendant was not liable to plaintiff as for money paid under mistake. — *National City Bank v. Westcott*, N. Y., 23 N. E. Rep. 900.

7. CARRIERS OF PASSENGERS — Injuries. — The conductor of an elevated train signaled it to start at the same instant that he opened the gate for a passenger to alight, and the motion of the train in starting caused the door to swing onto the passenger's hand, injuring it: *Held*, that the company was chargeable with negligence.—*Baker v. Manhattan By. Co.*, N. Y., 23 N. E. Rep. 885.

8. CARRIERS—Assault on Passenger.— In an action for injuries received by plaintiff, a colored man, while a passenger on defendant's train: *Held*, that instructions that, as the law required separate accommodations on railroad trains for white and colored people, if defendant's failure to provide such separrte cars was the proximate cause of plaintiff's injuries, he could recover, were properly refused. — *Royston v. Illinois Cent. R. Co.*, Miss., 7 South. Rep. 320.

9. CARRIERS OF PASSENGERS — Negligence. — A passenger on a crowded horse-car of defendant's gave up his seat to his wife, who, by reason of an injury, was unable to stand, and sought a place on the front platform, where he stood with one foot on the step, and holding on to the rail of the dasher with his right hand. The pressure of the crowd broke his hold, and he fell under the car, and was injured: *Held* that whether defendant negligently caused the injury, and whether the passenger negligently contributed to his own injury, were questions of fact for a jury. — *Lehr v. Steinway, etc. R. Co.*, N. Y., 23 N. E. Rep. 889.

10. CHANGE OF VENUE — Substitution of Attorneys. — Where it appears that attorneys, residing in the county to which it is sought to transfer the cause, were substituted as the attorneys of record of the party making the application, after proceedings for removal were begun; that they have never acted as such, but have been represented by the attorney for whom they were substituted,—it is apparent that the substitution was made for no other purpose than the removal of the cause to their county, and the transfer should not be allowed. — *Kelly v. Alcona Circuit Judge*, Mich., 44 N. W. Rep. 925.

11. CHARITABLE REQUESTS.—A condition, in a bequest for educating two young men for the ministry, that they shall, after entering it, pursue a certain course, that was not optional with the minister, but subject to the control of the bishop, is a condition subsequent, and does not affect the validity of the gift. — *Field v. Drew Theological Seminary*, U. S. C. C. (Del.), 41 Fed. Rep. 371.

12. COMPROMISES—Equitable Relief.— Where a person knows that another is asserting a claim against him which is not right, but compromises the matter rather than go to law, and does so understandingly, and on equal terms with the other as to capacity to litigate, if he so desires, and there is no deception in obtaining the settlement, and the contract of settlement is partly performed by him, with deliberation, and not of necessity, a court of equity will not go behind the settlement to ascertain who was right in the original controversy, but will uphold it as a valid compromise of a controversy.—*Dailey v. King*, Mich., 44 N. W. Rep. 959.

13. CONSTITUTIONAL LAW—Fishing. — Laws N. Y. 1880, ch. 591, § 2, declaring that any net or other means or device for taking fish in violation of laws for their protection is a valid exercise of power to regulate fishing in public waters. — *Lawton v. Steele*, N. Y., 23 N. E. Rep. 878.

14. CONSTITUTIONAL LAW—Peddler's License. — Comp. Laws Dak. § 2433, providing that a tax for territorial purposes shall be levied on peddlers of wares and merchandise not manufactured within the limits of the territory, for a license to peddle in the territory, is unconstitutional as discriminating against the sale of manufactures of other States. — *Rogers v. McCoy*, Dak., 44 N. W. Rep. 990.

15. CONSTITUTIONAL LAW. — Laws Mich. 1873, Act 196, art. 4, § 15, as amended by Laws Mich. 1889, Act 165, providing that "in cases where a railroad is immediately adjacent to or laid upon a highway, open, unobstructed residence crossings, suitably guarded, substantially as are provided for highway and street crossings, shall be provided and maintained by the railroad corporation

operating said railroad; provided, the same shall be so ordered by the railroad commissioner,"—is unconstitutional, is so far as it authorizes the taking of the property of a railroad company for public use, without compensation. — *People v. Detroit, etc. Ry. Co.*, Mich., 44 N. W. Rep. 934.

16. CONSTITUTIONAL LAW— Action for Homicide.— The act entitled "An act to amend § 2971, of the Code of 1882, as amended by the act approved December 16th, 1887," is not invalid as containing more than one subject-matter; the section of the Code giving a right to widows and children to recover for the homicide of the husband or parent, to the full value of the life of the deceased, and the amendment extending that right to the husband, mother, and father for the homicide of wife or child, and defining the term "full value of the life of the deceased." — *Clay v. Central Railroad, etc. Co.*, Ga., 10 S. E. Rep. 967.

17. CONTEMPT.—Where an appeal has been taken by a receiver from a decree dissolving a temporary injunction, and ordering him to deliver over possession of the property to the persons entitled thereto under the decree, and the bond filed as required by Laws Colo. 1885, p. 354, § 23, to effect a *supersedeas*, the court is ousted of all authority to enforce the decree, and the receiver is not in contempt for declining to execute it. — *Hurd v. People*, Colo., 23 Pac. Rep. 342.

18. CONTRACTS—Mutual Assent.—Defendants executed to plaintiff a writing whereby they agreed to convey to him a piece of land out of a certain 80-acre tract, to be not less in area than 40x120 feet, and to front on a public street or road; the particular location and description to be thereafter mutually agreed on by the parties. The particular location and description of the land was never agreed on: *Held*, not to constitute a contract; distinguishing it from cases where the agreement provided definite means by which the land was to be ascertained without any further agreement of parties, as where one party had the right to select.—*Scanlon v. Oliver*, Minn., 44 N. W. Rep. 1031.

19. CORPORATIONS—Officers. — The officer of a private corporation is not responsible for the corporate funds and papers intrusted to his care, and lost by him without negligence on his part. — *Mowbray v. Antrin*, Ind., 23 N. E. Rep. 858.

20. CORPORATIONS— TAX. — *Held*, that an association for the "encouragement of debating, reading, and literature, and the enjoyment of rational and social amusements, and the playing of ten-pins, chess, and checkers, and other lawful games of the kind," but which excludes all drinks, and has no connection with business purposes of any kind, nor politics, nor has in view any pecuniary profit of any kind, may be incorporated without the payment of the tax required by Const. Art. 10, § 21. — *State v. Lessuer*, Mo., 13 S. W. Rep. 237.

21. CORPORATIONS—Fees.—*Held*, that the provisions of ch. 225, Gen. Laws 1889, apply to Iowa railway companies who accept the provisions of ch. 14, Gen. Laws 1877, and that such companies are required, as a condition precedent to filing their articles of association with the secretary of State, to pay into the State treasury the fees prescribed by the act of 1889.— *State v. Sioux City, etc. R. Co.*, Minn., 44 N. W. Rep. 1032.

22. COUNTIES — Contracts. — Rev. St. Mo. 1879, ch. 84, provides that a contract for building a bridge shall be let to the lowest bidder, and, when approved by the county court, it is then the duty of the court to make an appropriation, and "order the commissioner to contract therefor at the price let:" *Held*, that a written contract which recites that it is made by one "*ex officio* road and bridge commissioner of the county," which is signed by the contractor, but not signed by the commissioner, is the contract of the county; as the order of the court approving the bid, and the contract as signed by the contractor, when read together, shows a binding contract. — *Bryson v. Johnson County*, Mo., 13 S. W. Rep. 239.

23. CRIMINAL LAW — Larceny. — A broker who, by falsely representing to the consignee of goods that he has secured a purchaser therefor, obtains a delivery order on the carrier, giving the consignee a memorandum containing the fictitious contract of sale, purporting to be on the same consignee's account, and who thereafter takes possession of the goods, and stores them in his own name, is guilty of a common larceny. —*Soltau v. Gerdau*, N. Y., 23 N. E. Rep. 864.

24. CRIMINAL LAW — Indigent Defendants — Appeal.— Under Const. Ind. § 12, of bill of rights, and Rev. St. Ind. 1881, § 260, providing for the assignment of an attorney for poor persons by *nisi prius* courts,—an accused, for whom, being without means, an attorney has been assigned and has made defense, cannot of right demand a long-hand transcript of the evidence to be paid for by the county, in order to enable him to prosecute an appeal.—*In re Morgan*, Ind., 23 N. E. Rep. 863.

25. CRIMINAL LAW— Larceny. — An averment of the theft of "United States paper currency money of a certain value" is sustained by proof that the stolen property was either United States treasury notes, or national bank notes, or United States gold or silver certificates. — *Kimbrough v. State*, Tex., 13 S. W. Rep. 218.

26. CRIMINAL LAW—Murder.—On a trial for murder, where the evidence for the prosecution shows an unprovoked, deliberate, and malicious killing, and defendant's testimony shows that he brought on the difficulty which resulted in the killing, and there is no evidence that defendant was in any real or apparent danger which he could not have avoided by retreating, evidence of former difficulties between deceased and defendant, and of deceased's ill feelings towards him, is inadmissible.— *Rutledge v. State*, Ala., 7 South. Rep. 335.

27. CRIMINAL LAW—Homicide.—A person who places a string with an explosive bomb attached to it, across a drive way, with the intent that some person, by driving over it, shall explode the bomb, and be killed thereby, is guilty, under Rev. St. Wis. § 4374, providing that "any person who shall attempt to commit the crime of murder by poisoning, drowning, or strangling another person, or by any means not constituting an assault with intent to murder, shall be punished," etc.—*Jambor v. State*, Wis., 44 N. W. 963.

28. CRIMINAL LAW—Larceny— Venue.—An indictment for larceny must be tried in the parish in which the offese was either actually or in contemplation of law committed. An offender who has stolen property in one parish and carried it to another may be tried in either parish. The continuance of the asportation is a new caption.—*State v. McCoy*, La., 7 South. Rep. 330.

29. CRIMINAL LAW—Evidence at Former Trial.—In a criminal prosecution, evidence to show what the accused, testifying in his own behalf, had stated on a previous trial on the same charge, in which the jury had failed to agree is irrelevant and inadmissible, unless it be to prove a confession or admission of guilt, if it appears that the defendant did not testify at all on the second trial, at which he was convicted. — *State v. Brownson*, La., 7 South. Rep. 328.

30. CRIMINAL PRACTICE.— Change of Venue.— On a murder trial, a change of venue is not warranted by defendant's testimony that at the time of his arrest a mob was formed to hang him, and that the officer who arrested him avoided the mob by going another route, and by the testimony of two other witnesses that people generally believe defendant guilty, and think he ought to abide the consequences, where the arresting officer testifies that he never heard of any mob.—*Rains v. State*, Ala., 7 South. Rep. 315.

31. DOWER— Release.—An arrangement before marriage between husband and wife, for a fair consideration to extinguish her right of dower is valid.—*Wright v. Wright*, Mich. 44 N. W. Rep. 944.

32. EMINENT DOMAIN.—An act of the legislature authorizing the city authorities to grant a railroad company an encroachment on a public street in front of two of its lots confers no authority to grant the right to

close up an alley running between the lots, especially where the act provides for compensation for the damages by the use of the street, and makes no mention of damages from closing the alley.—*Georgia, etc. R. Co. v. Harvey*, Ga., 10 S. E. Rep. 971.

33. EQUITY—Fraud—Weight of Evidence.—A petition by the equitable owners of swamp land, seeking to cancel deeds thereof to defendants on the ground of fraud and want of consideration, alleged that defendants, as attorneys, associated themselves with plaintiffs' attorney to secure a patent for the land from the county, and obtained the deeds on the express understanding that, if successful, they would pay one-half the notes given by plaintiffs' ancestor to the county for the purchase price, and also deed back to plaintiffs' attorney one-half of the land in trust for plaintiffs; that defendants thereafter repudiated the agreement: *Held*, that the petition stated a cause of action, though it failed to allege that defendants intended to defraud plaintiffs in the first instance, when the deeds were executed.—*Sayer v. Devore*, Mo., 13 S. W. Rep. 201.

34. EQUITY—Pleading.—The criterion of immateriality of interrogatories in a bill in equity is not whether an affirmative answer will prove the bill, but whether it tend to prove the bill.—*Uhlmann v. Arnholt & Schaeffer Brewing Co.*, U. S. C. C. (Penn.), 41 Fed. Rep. 369.

35. EXECUTION SALE—Executors.—Where land sold upon a judgment recovered by an executor is bid in by him at execution sale, and by mistake the sheriff's deed is made out to the heirs of the testator, the land becomes an asset of the estate, and the fact of the mistake may be shown in a subsequent suit between the devisees of the testator and parties deriving title from the executor.—*Bennett v. Kiber*, Tex., 13 S. W. Rep. 220.

36. EXECUTION—Supplementary Proceedings.—A complaint showing a judgment in favor of plaintiff; an execution to the county of the debtor's residence, he being an unmarried man; its return unsatisfied; an indebtedness by two of the defendants to the judgment debtor in specific sums, not exempt from execution, and his refusal to apply the same in satisfaction of the judgment, and that a third defendant is asserting some claim to that indebtedness—states facts sufficient to require all the defendants to answer.—*American White Bronze Co. v. Clark*, Ind., 23 N. E. Rep. 855.

37. EXECUTIONS—Claim and Delivery.—In an action of claim and delivery, brought against a sheriff, the defendant justified his seizure and detention of the property under two certain writs of attachment in his hands against the property of plaintiff and anticipating that plaintiff would claims uch property exempt from seizure under the general exemption law of the State, defendant alleged, further, that the debts sought to be recovered in the actions in which the attachments were issued were debts incurred by plaintiff under false pretenses, setting forth such pretenses: *Held*, a good defense, under section 5139, Comp. Laws.—*Taylor, v. Rice*, N. Dak., 44 N. W. Rep. 1017.

38. EXEMPTIONS—Joint Owners.—The interest of one joint owner of property may be sold on execution against her, though the property is exempt as to the other joint owner.—*Stanton v. French*, Cal., 23 Pac. Rep. 355.

39. FRAUDULENT CONVEYANCE—Possession.—To constitute a "delivery or change of possession," under the fourth section of the insolvent law (Laws 1881, ch. 149), there must be an actual delivery and change of possession. A mere symbolical delivery and constructive change of possession is insufficient.—*Chickering v. White*, Minn., 44 N. W. Rep. 988.

40. FRAUDULENT CONVEYANCES.—Where there is a controversy as to whether a mortgage executed by defendant is a sham, he cannot prove that fact, on cross-examination of plaintiff's witness, by statements which he made to witness out of court, though he may examine as to such statements for the purpose of testing the witness' recollection.—*Eldredge v. Sherman*, Mich., 44 N. W. Rep. 948.

41. FRAUDULENT CONVEYANCES—Evidence.—Where an action is brought to set aside a sale on the ground that it was made in fraud of creditor, admits that he was indebted to defendants when the sale was made, it is error to refuse to instruct the jury that defendants were not required to prove the items of their account, but that the indebtedness might be shown by the debtor's admissions, or by any evidence that satisfied the jury of the correctness of defendants' claim.—*Hirsch v. Richardson*, Miss., 7 South. Rep. 323.

42. FRAUDULENT CONVEYANCES—Secret Trusts.—*Held*, that a parol agreement reserved a trust in the property conveyed by a debtor in favor of a creditor, and, not being apparent in the bill of sale, was secret, and consequently the transaction was against public policy, and fraudulent in law, and therefore void as to attaching creditors.—*Newell v. Wagness*, N. Dak., 44 N. W. Rep. 1014.

43. GARNISHMENT—Assignment.—Defendant in attchment, who was working for a county under a contract gave to the county clerk the following order: "You are hereby directed to deliver to J all warrants issued by the board of county commissioners to me for and on account of [the work done], to be held by said J as collateral security for a note of even date hereto attached." The clerk accepted the order by writing across the face, "Accepted this 7th day of June, A. D. 1883:" *Held*, that the claim against the county was so assigned as to be beyond the reach of a garnishment.—*Lewis v. Board of Commissioners*, Colo., 23 Pac. Rep. 338.

44. GRANTS—Conditions.—Land was conveyed to a town for a highway by deed conditioned "that no house building, or other erection whatsoever, except a public monument, shall be built or erected or permitted upon" it: *Held*, that an area way constructed below the surface of the land for the purpose of supplying light and access to the basement of an adjoining building, by means of gratings flush with the sidewalk that was laid over it, was not an erection upon the land, within the meaning of the condition.—*Rose v. Hawley*, N. Y., 23 N. E. Rep. 904.

45. HIGHWAYS—User.—Where plaintiff claims a highway over defendant's land by user, evidence is admissible for defendant that such user was, under an agreement made by the highway authorities with him that the public might cross his land temporarily, for the purpose of avoiding a defect in the highway as originally laid out, until the true highway could be put in safe condition, and that he continued to allow such use of his land, relying on the promise of the authorities year after year to restore it to him, as such user is not sufficient.—*Commissioner of Highways v. Riker*, Mich., 44 N. W. Rep. 955.

46. HOMESTEAD—Selection.—Under Code Ala. § 2534, providing that, in homestead exemption contests, the commissioners shall make allotment by metes and bounds, having consideration of the debtor's selection, and the quality and quantity of the real estate, from the land most contiguous to the dwelling, and including the dwelling and appurtenances, the debtor cannot select the land in an irregular and arbitrary manner, and without reference to contiguity, or the former use to which it was put.—*Jaffrey v. McGough*, Ala., 7 South. Rep. 333.

47. HOMESTEAD—Head of Family.—A brother who lives with his invalid sister, who is dependent on him for support, and whom he does support, is the head of a family within the meaning of the homestead laws, though his sister owns the property in which they live.—*Moyer v. Drummond*, S. Car., 13 S. W. Rep. 952.

48. HUSBAND AND WIFE—Division of Property.—Under Civil Code Cal. § 158, a division of community property between a husband and wife on their separation, followed by the record of an inventory of the wife's separate property, including her share of the divided property, gives the wife priority therein over a creditor

of the husband who had both actual and constructive notice of the division before bringing suit, though there had been no immediate delivery of the divided property to the wife, followed by an actual and continued change of possession. — *Carter v. McQuade*, Cal., 23 Pac. Rep. 348.

49. INSURANCE—Proof of Loss.— A contract of fire insurance made in Iowa, the statutes of which State provide in what counties an action may be brought on the policy, does not limit the right to bring an action for loss of the property to that State. The action is transitory in its nature, and may be brought wherever service may be had on the company. — *Insurance Co. v. McLimans*, Neb., 44 N. W. Rep. 991.

50. INSURANCE—Waiver.—In an action on a life policy, the defense was that default in the payment of a premium had forfeited the policy. The time of payment was extended by a general agent of the company, pending negotiations relative to the exchange of the life policy for a paid-up policy, who had been accustomed to receive premiums after they were due and the company had been accustomed to ratify his acts by accepting the premiums: *Held*, that the general agent was specially authorized to extend the time of payment of premiums. — *Wyman v. Phœnix, etc. Ins. Co.*, N. Y., 23 N. E. Rep. 907.

51. INTEREST — Parol Agreement. — Under How. St. Mich. § 1594, a verbal agreement for a reduction of the rate of interest expressed in a note is void. — *Tousey v. Moore*, Mich., 44 N. W. Rep. 958.

52. INTOXICATING LIQUORS—Evidence. — Evidence admissible in prosecution for illegal sale of intoxicating liquors.—*People v. Hicks*, Mich., 44 N. W. Rep. 931.

53. INTOXICATING LIQUORS—Illegal Sale.— On a prosecution under Sess. Laws Mich. 1887, Act. No. 313, for illegally selling intoxicating liquor, a motion to dismiss the case, on the ground that the justice never acquired any jurisdiction to issue his warrant because there was no competent evidence before him of defendant's failure to pay his tax and file his bond, should be made before the jury is sworn.—*People v. Haas*, Mich., 44 N. W. Rep. 28.

54. JUDGMMNT— Certainty. — A judgment in favor of "the descendants" of a person deceased, without naming them individually, is not void for uncertainty, as it is to be presumed that the papers in the case disclose their individual names. — *Stevenson v. Flournoy*, Ky., 13 S. W. Rep. 210.

55. JUSTICES OF THE PEACE—Procedure. — Irregularities in a summons issued from a justice's court, in not fully apprising defendant of the nature of the action, or of the relief that will be demanded in case of default, are waived by appealing after default, though defendant appear specially in the appellate court to move to dismiss the action.—*Gage v. Maryatt*, Mont., 23 Pac. Rep. 337.

56. LANDLORD AND TENANT—Forcible Dispossession.— In an action for damages for unlawful and violent dispossession, brought by tenants against a landlord, evidence that defendant was a hard tempered and dangerous man is admissible to show the effect of his actions and threats on the conduct of plaintiffs in leaving the premises, and to rebut the statement of defendant's counsel, in the presence of the jury, that, though defendant did chase plaintiffs off and did have a gun there, it was done with the advice of counsel, and without any intention of hurting anybody.— *Baumier v. Anteau*, Mich., 44 N. W. Rep. 939.

57. LICENSE — Pool selling. — Act Tenn. April 8, 1889, entitled "An act to provide revenue for the State," etc., imposing a license fee "upon each person engaged in selling pools upon any running, trotting, or pacing race in this or in any other State," does not extend the law authorizing the sale of pools on races run on licensed tracks within the State, so as to legalize the selling of pools on races taking place out of the State. —*Palmer v. State*, Tenn., 13 S. W. Rep. 233.

58. LIMITATION OF ACTIONS — Mutual Accounts. — Whether, upon the facts, the account was a "mutual and open account" within the meaning of the statute. —*In re Hiscocks Estate*, Mich., 44 N. W. Rep. 947.

59. MASTER AND SERVANT—Negligence. — In order to recover punitive damages for injuries caused by the negligence of defendant's servant, it is not necessary to show knowledge by defendant of habitual negligence or incompetency of the servant, and, if plaintiff attempts to show it, a failure will not prevent recovery.— *Southern Exp. Co. v. Brown*, Miss., 7 South. Rep. 818.

60. MASTER AND SERVANT — Fellow-servant. — The assistant road master, under whose supervision plaintiff was working, had general charge of about 150 miles of defendant's road, and controlled all the section gangs along that line. He had full oversight of the work in which plaintiff was engaged at the time of the injury, and it appeared that plaintiff looked on him as the responsible head, from whom he (plaintiff) received his orders, and who had power to discharge him: *Held*, that he was not a fellow-servant of plaintiff, but represented defendant, who was liable for his negligence while in the line of his duty.— *Harrison v. Detroit, etc. R. Co.*, Mich., 44 N. W. Rep. 1034.

61. MEASURE OF DAMAGES — Warranty. — When an article, made and delivered under an express warranty as to its fitness for a particular purpose, proves unfit for that purpose, the proper measure of damages recoverable by the vendee, if he uses the article, is not the cost of changing it and making it conform to the warranty, but the losses sustained by him, including profits he would have made.— *Beeman v. Banta*, N. Y., 23 N. E. Rep. 887.

62. MECHANICS' LIENS — Husband and Wife. — An oral contract with a married woman, without the assent of the husband, is sufficient to create a lien for work done or materials furnished, notwithstanding Code Ala. 1886, § 2346, which limits the wife's power to make contracts to those in writing, "with the assent of the husband expressed in writing." — *Cutcliff v. McAnnally*, Ala., 7 South. Rep. 331.

63. MINES AND MINING— Rev. St. U. S. § 2324, does not require a notice of a mining claim to be either posted or recored, but intrusts that matter to local regulation, subject to the condition that, when a notice is required to be recorded, it shall contain *inter alia*, a description of the property: *Held*, that where the local rules require that a notice shall be posted and recorded, and in reference to the notice to be posted repeat the requirements of the statute, the recording of a notice as it is posted is sufficient, provided that the posted notice itself sufficiently complies with the rules. — *Carter v. Boci Galupi*, Cal., 23 Pac. Rep. 362.

64. MINING CLAIMS—Location. — The provision of Rev. St. U. S. § 2320, in reference to the location of mining claims, that "the end lines of each claim shall be parallel with each other," is merely directory, and a claim located substantially in compliance with that section, and containing no more area than it authorizes, is not vitiated, even so far as to affect the right given by § 2322 to follow a vein beyond the side lines, by the fact that one of the end lines diverges. — *Doe v. Sanger*, Cal., 23 Pac. Rep. 365.

65. MORTGAGES—Foreclosure.—Where, on foreclosure of a "blanket" mortgage on property, which is also covered by junior mortgages on the separate parcels, a sale is ordered in parcels in the inverse order in which the junior mortgages were given, and the sale of the last lot produces a surplus, such surplus cannot be regarded as constituting a specific fund, subject to the specific lien upon the last lot, but a common fund, distributable to all of the lienors upon the land sold, in the order of the dates when the liens were created. — *Burchell v. Osborne*, N. Y., 23 N. E. Rep. 896.

66. MORTGAGES—Sales under Powers.—A sale, under a power in a mortgage, in gross as one parcel, of several separate and distinct tracts of land, is not void, but only voidable, for good cause shown, as that it was the result of fraud, or that prejudice resulted to the mort-

gagor or owner of the equity of redemption.—*Willard v. Finnegan*, Minn., 44 N. W. Rep. 985.

67. MORTGAGE—Foreclosure. — An order made by the district (circuit) judge, under the provisions of § 5411, Comp. Laws, refusing an order enjoining foreclosure proceedings by advertisement, is an order of the judge, and not of the court, and is not appealable.—*Commercial Nat. Bank v. Smith*, S. Dak., 44 N. W. Rep. 1024.

68. MUNICIPAL CORPORATION.—Ice on Sidewalks.—The duty of a city to exercise reasonable care to keep its sidewalks in a safe condition does not extend to the removal of ice, which constitutes no other defect than slipperiness, there being no such accumulation of ice as to constitute an obstruction to travel, and no ridges or inequalities of such height, or lying at such inclination or angle, as would be likely to trip passengers or cause them to fall.—*Henkes v. City of Minneapolis*, Minn., 44 N. W. Rep. 1026.

69. MUNICIPAL CORPORATION.—Street Improvements. —The city charter of Galvestion authorizes the city to pave and improve streets whenever, by a vote of two thirds of the aldermen, they may deem it necessary, provided the city pays one-third, and the abutting owners two-thirds, of the cost: *Held*, that a petition by the city to collect of an abutting owner his share of the cost is insufficient to support a judgment by default, if it fails to allege that the two-thirds vote of the alderman was passed, as required.—*Wood v. City of Galveston*, Tex., 13 S. W. Rep. 227.

70. MUNICIPAL CORPORATIONS—Business Tax.—Under a charter giving the municipal authorities the right to impose a business tax on all persons doing business in the city, and to impose this tax by requiring owners of wagons engaged in carrying on the the owner's business in the city to take out a license therefor, the owner of woodland near the city, which he is clearing up, who hauls the wood into the city and sells it, having no office or woodyard, cannot be required to pay a license tax, as he is not engaged in business in the city.—*Gunn v. Mayor*, Ga., 10 S. E. Rep. 972.

71. MUNICIPAL CORPORATIONS—Actions.—The statutes of New York do not empower a municipal corporation, either expressly or by implication, to borrow money to defray the expenses of a suit instituted in its behalf.—*Wells v. Town of Salina*, N. Y., 23 N. E. Rep. 870.

72. NEGOTIABLE INSTRUMENTS—Contribution.—A party who signs as surety a note renewing one wherein he is a joint maker, is so benefited by the new note as to render his estate liable in equity upon his decease, for the payment of the new note.—*Bell v. Boyd*, Tex., 13 S. W. Rep. 232.

73. NEGOTIABLE INSTRUMENTS.—Where there is no evidence that defendant assumed payment of a due-bill given by a third person, the fact that he did pay part of it does not render him liable for the balance.—*Walker v. Noell*, Tex., 13 S. W. Rep. 231.

74. NEGOTIABLE INSTRUMENTS—Drafts—Acceptance.— A telegraph promising to pay a certain draft constitutes an acceptance of the draft.—*In re Armstrong*, U. S. C. C. (Ohio), 41 Fed. Rep. 381.

75. NEGOTIABLE INSTRUMENT.—In an action on a note signed by defendant and three others, if, when the note was drawn and signed by the real debtor, there was no understanding and agreement on the part of defendant that he would sign, and that the payee did not accept the note as signed, but merely took it, temporarily, to procure the other signers, and did not turn over the consideration till all had signed, defendant was liable; but if the note was delivered as a fully executed note, and the consideration was passed over, and the payee afterwards took the note to defendant, and he signed it, there was no consideration therefor and defendant was not liable.—*Steers v. Holmes*, Mich., 44 N. W. Rep. 922.

76. NEW-TRIAL—Newly-discovered Evidence.—An application for a new trial, based on newly-discovered evidence is properly overruled, on the assignment of the trial judge that the witnesses relied upon were summoned by the accused to attend the trial, and were personally present during the trial, and were not interrogated by him.—*State v. Dorsey*, La., 7 South. Rep. 327.

77. OFFICIAL BONDS — Clerk of Court. — The sureties on the bond of the clerk of a district court, conditioned that he shall "properly account for all money coming into his hands" as required by law, are liable for his misappropriation of money paid to him as clerk, under order of court, though such order is based upon the practice of the court, and not upon direct statutory authority.—*In re Finks*, U. S. D. C. (Va.), 41 Fed. Rep. 383.

78. PARENT AND CHILD—Bastards.—Mansf. Dig. Ark. § 445, *et. seq.*, enabling the mother of a bastard child to cast the legal liability for its support on the father, furnishes a sufficient consideration for the father's promise to pay her for the maintenance of the child.—*Dair's Est. v. Harrington*, Ark., 13 S. W. Rep. 215.

79. PARTNERSHIP—Fraunulent Conveyances.—A transfer of all of the firm property by one of the partners to his father, in payment of a loan made by the father to aid him buying his interest in the business, which transfer was made without the consent, express or implied, of his copartner, is void, as against the partnership creditors, though no wrong was actually intended, and though a part of the money loaned by the father was used in paying firm debts.—*Feucht v. Evans*, Ark., 13 S. W. Rep. 217.

80. PARTNERSHIP.—Complainant, having bought an interest in a mercantile business and advanced money, afterwards made a contract with his partner by which the latter agreed to close up the business on a certain date when complainant might at his option, receive the amount he had paid for his interest, and the advances made by him, with interest or the amount he had invested, and half the profits: *Held*, that at the time agreed upon, complainant could elect to be a creditor of the firm to the extent of his investment and interest or to remain a partner.—*Brinson v. Berry*, Miss., 7 South. Rep. 322.

81. PARTNERSHIP—Corporation.—Construction of articles of a copartnership and rights in the formation of a corporation therefrom.—*Hennessy v. Griggs*, N. Dak., 44 N. W. Rep. 1010.

82. PLEADING—Exemplary Damages.—In an action for breach of contract, a general allegation that defendant broke the contract "willfully, fraudulently, and with malice" is not sufficient to authorize a recovery of exemplary damages.—*Hooks v. Fitzenrieter*, Tex., 13 S. W. Rep. 230.

83. POWER OF ATTORNEY — Dower. — A power of attorney to sell land and receive payment, though ineffectual, because the officer who took the acknowledgment was not authorized thereto, confers authority to make an executory contract for the sale of land, which is not affected by the subsequent marriage of the principal; and a deed executed by the attorney in his own name, without disclosing his principal, though for that reason, not a valid execution of the power, is competent evidence to show the sale of land, and payment of the price; and vests in the vendee an equitable title. —*Joseph v. Fisher*, Ind., 23 N. E. Rep. 856.

84. PRINCIPAL AND AGENT — Ratification. — Where a lease is executed by an unauthorized agent, the principal, by accepting the rent for five years without objection, and permitting the tenants to make alterations, ratifies the acts of her agent, and waives any right to disaffirm upon any ground.— *Clark v. Hyatt*, N. Y., 23 N. E. Rep. 891.

85. PRINCIPAL AND AGENT. — Bail trover having been brought by an agent in his own name for a horse that he had received in exchange for other property of his principal, the money paid, after judgment by the surety on the bail-bond, is the property of the principal, as against judgment creditors of the agent. — *Watertown Steam engine Co. v. Palmer Bros.*, Ga., 10 S. E. Rep. 969.

86. PRINCIPAL AND AGENT—Termination. — When the compensation of an agent is dependent upon the suc-

cess of his efforts in procuring a contract for his principal, and his subsequent performance of the work, the principal will not be permitted to stimulate his efforts with the promise of reward, and then, when the contract is obtained and the compensation assured after construction, terminate the agency for the sole purpose of securing to himself the agent's profits.—*Warren Chemical, etc. Co. v. Holbrook*, N. Y., 23 N. E. Rep. 908.

87. PRINCIPAL AND SURETY—Contribution.— The equitable right of contribution between sureties having long been recognized as the foundation of an implied contract, and the legal action on such contract being barred after three years, contribution sought by an administrator of a paying surety from a co-surety will be refused in a court of equity after an unaccounted for delay of nearly eighteen years.— *Pickering v. Leiberman*, U. S. D. C. (Del.), 41 Fed. Rep. 376.

88. RAILROAD COMPANIES—Persons on Track. — Deafness of one about to cross a railroad track imposes on him increased vigilance in the use of his eye-sight; and those operating a train may, in the absence of knowledge, and of any fact that would arouse their suspicions, assume, on seeing him, that he is in the possession of all his senses, and using them for his own safety. — *International, etc. R. Co. v. Garcia*, Tex., 13 S. W. Rep. 223.

89. RAILROAD COMPANIES— Crossings. — In an action for injuries received at a railroad crossing, it is a question for the jury whether plaintiff's failure to look for approaching trains was negligence, and hence it is proper to refuse to instruct that if plaintiff, by using his senses of sight and hearing, could have discovered the train in time to avoid the accident, he cannot recover.—*Gulf, etc. Ry. Co. v. Anderson*, Tex., 13 S. W. Rep. 196.

90. RAILROAD COMPANIES— Transportation Arrangement.—Where the receiver of a railroad company makes an arrangement for the transportation of the freight and passengers of another railroad company over the line of his road, and there is no provision making the arrangement obligatory on either party for any stated period of time, the receiver may terminate such arrangement at will, without previous notice to the other company.— *Investment Co. v. Ohio, etc. Ry. Co.*, U. S. C. C. (Ohio), 41 Fed. Rep. 378.

91. RAILROAD COMPANIES—Stopping Train in Dangerous Place.—It is a question for the jury whether or not it is negligence to lock the door of a privy on a railroad car, leaving no person in attendance to unlock it, and stopping over a cut twenty feet in depth without giving notice to the passengers of the danger to which they would be exposed if they attempted to leave the car.—*Wood v. Georgia, etc. Co.*, Ga., 10 S. E. Rep. 967.

92. RAILROADS— Damages to Abutting Property. — In an action against an elevated railroad company to recover damages for the maintenance of its railroad in front of plaintiff's premises, an instruction that, in estimating the damages caused by the interference with the light, air, and access appurtenant to the premises, "the jury may take into consideration any benefits peculiar to plaintiff's house which have arisen by the construction of the road, as shown by the evidence," is not in conflict with Laws N. Y. 1850, ch. 140, § 16, and Laws 1875, ch. 606, § 30, providing that, in determining the amount of compensation for lands taken, no allowance shall be made on account of the benefits derived from the construction of the road. — *Newman v. Metropolitan, etc. Ry. Co.*, N. Y., 23 N. E. Rep. 901.

93. REMOVAL OF CAUSES—Citizenship. — The plaintiff, was at the time of its commencement, and so continued up to the admission of the State of South Dakota, a resident and citizen of the said territory of Dakota, and is now a citizen of the State of South Dakota, and defendant was at the time the action was commenced, and is now, a citizen of the State of New York. *Held*, on motion of defendant to transfer cause to the circuit court of the United States for the district of South Dakota, that his right to such transfer must be determined on the hypothesis that the State of South Dakota had been admitted into the Union, and the federal courts established therein, and the plaintiff a citizen thereof, at the time the action was commenced.—*Dorne v. Richmond Silver Min. Co.*, S. Dak., 44 N. W. Rep. 1021.

94. RES ADJUDICATA — Administrators. — A matter tendered as an issue on an executrix's final account, regularly opposed by a creditor of the succession, evidence adduced thereon *pro et con*, and finally and contradictorily determined by a definite judgment on appeal, cannot be thereafter litigated between the same parties. Such a decree constitutes *res adjudicata*.— *Succession of Duhe*, La., 7 South. Rep. 327.

95. SALE— Statute of Frauds. — *Held*, upon the facts, that the jury was warranted in finding that the sale was not accompanied by immediate delivery, and followed by an actual and continued possession, as required by Gen. St. Colo. p. 509, § 14, which makes every sale of goods and chattels by a vendor in possession void as against the creditors of the vendor unless the sale "be accompanied by an immediate delivery, and be followed by an actual and continued change of possession, of the things sold." — *Baur v. Beall*, Colo., 23 Pac. Rep. 345.

96. SCHOOL-DISTRICTS—Teacher's Salary.—Every contract relating to the employment of a teacher who does not hold a lawful certificate of qualification is void by the express terms of the statute, and every warrant issued in payment of services of such teacher is without consideration and void.—*Goose River Bank v. Willow Lake School*, N. Dak., 44 N. W. Rep. 1002.

97. TELEGRAPH COMPANIES— Negligence. — An action will not lie against a telegraph company, either under the statute or at common law, for failure to transmit a verbal message, orally delivered to the operator, in the absence of evidence of a custom to that effect.—*Western Union Tel. Co. v. Dozier*, Miss., 7 South. Rep. 325.

98. TRESPASS—License.—Permission to cut and carry off timber on land owned in common, given by one of the tenants, is a mere naked personal license, not assignable, and is revoked by a conveyance by such tenant of his interest to his co-tenants, or by withdrawal of the permission. — *Ward v. Rapp*, Mich., 44 N. W. Rep. 934.

99. TRESPASS—Prospective Damages.—Defendants unlawfully entered upon plaintiff's farm, and dug two parallel ditches, thirty feet apart, and threw up the earth between them into a turnpike, claiming (but erroneously) that the *locus in quo*, was a public highway: *Held*, that these acts constituted a single trespass, and gave only a single cause of action, in which the plaintiff was entitled to recover all damages, present or prospective, resulting to the land from the trespass.— *Ziebarth v. Nye*, Minn., 44 N. W. Rep. 1027.

100. TRIAL BY COURT— New Trial. — Where a trial is had to the court, and its findings announced, an undetermined motion for a new trial operates to reserve the case, and continue the jurisdiction beyond the term for the purpose of disposing of the motion and settling a bill of exceptions.—*Stocking v. Morey*, Colo., 23 Pac. Rep. 843.

101. TRUSTS AND TRUSTEE. — Where one receives a deed absolute in form, but intended as security only, and with a promise to reconvey upon payment, he becomes a trustee for the grantor to the extent of grantor's interest therein. Likewise, when one receives personal property as security only, and under a promise to return the same on certain contingencies, he becomes a trustee for the owner. — *Jasper v. Hazen*, N. Dak., 44 N. W. Rep. 1018.

102. WATERS AND WATER COURSES—Obstruction.—The right to use a navigable river is a public, and not a private right, and the owner of land on the stream cannot maintain an action for an illegal obstruction of navigation which prevents his use of this public right. To entitle him to maintain a private action, the obstruction must constitute an invasion or violation of some private right, as distinguished from the public right.— *Swanson v. Mississippi, etc. R. Co.*, Minn., 44 N. W. Rep. 966.